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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 19

Case No. .....

79-1577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID L. HEILMAN,
Defendant-Appellant.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

To the Honorable the Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

This is the petition of David L. Heilman for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported; it is printed in the appendix to this petition at App. 157.

JURISDICTIONAL STATEMENT

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered February 8, 1980. (App. 157.) The judgment of the Court of Appeals in this case is a final judgment. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the duplication of recordings fixed prior to February 15, 1972 within the protection of the compulsory license provisions of 17 U.S.C. sec. 1(e)?

2. Are the provisions of 17 U.S.C. sec. 1(e) and sec. 101(e) sufficiently definite so as to constitute a basis for a criminal violation?

3. Are the criminal sanctions of 17 U.S.C. sec. 101(e) applicable with respect to duplication of recordings fixed prior to February 15, 1972, where the compul-

sory license provisions of 17 U.S.C. sec. 1(e) have been met?

4. Did David L. Heilman willfully violate any provisions of the Copyright Act?

5. Was David Heilman entitled to a hearing and an opportunity to prove that he was the victim of an unlawful, selective prosecution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case concerns the interpretation and application of 17 U.S.C. secs 1(e) and 104 (as amended Oct. 15, 1971). The decision in the court below also denies Heilman his rights under the First and Fourteenth Amendments of the United States Constitution. These statutory and constitutional provisions are printed in the Addendum to this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of This Case.

This is a criminal prosecution for alleged violations of the copyright law. Defendant-Appellant, David L. Heilman, had been engaged in the business of producing and marketing anthologies of selections from popular music recordings made before February 15, 1972. In March, 1977, a grand jury indictment was filed against him in the Northern District of Illinois for alleged willful infringement of copyrights in violation of 17 U.S.C. sec. 1, sec. 101(e), and sec. 104 and for mail fraud in violation of 18 U.S.C. 1341. The mail fraud counts subsequently were dismissed, and Heilman was found guilty on 18 counts of copyright infringement. This appeal is from those misdemeanor convictions.

Prior to the commencement of this criminal action Heilman had commenced an action for a declaratory judgment in the United States District Court for the Eastern District of Wisconsin, in which action he sought a ruling that his activities did not constitute a violation of the copyright law. On July 14, 1977, after the criminal indictment already had been filed in Illinois, the District Court in Wisconsin ruled that Heilman's activities violated the copyright law and judgment was entered against him. *Heilman v. Bell*, 434 F. Supp. 565 (E.D. Wis. 1977). The District Court's ruling subsequently was affirmed by a divided Court of Appeals, 583 F.2d 393 (7th Cir. 1978), and certiorari was denied by the

United States Supreme Court, 98 S.Ct. 1499 (1978).

B. Statement of the Facts.

The facts of the case, as set forth in the affidavits of David L. Heilman (App. 101, 112, 116) and the stipulations of the government (App. 137) and the Defendant (App. 124), are not in dispute. David Heilman is a businessman and was president of E.C. Tape Service, Inc. until April, 1976. The company was engaged in the business of producing and marketing original anthologies of recorded music.

The recording industry in which he was involved is controlled principally by large record companies. (App. 109.) Each large recording company owns one or more publishing companies. These publishing companies in turn own the copyrights on numerous compositions. In addition, the recording companies own contracts with recording artists. Typically these contracts provide that all the costs of record production, except for the cost of record pressing (32 to 37 cents per album), are charged against the royalties payable to the artists. In addition, the unrecovered costs of one record can be, and frequently are, charged against the royalties of any subsequent record. These contracts typically last for seven years. By these methods the major recording companies have gained control over 80% of the major copyrights of musical compositions. (App. 109.)

E-C Tape was engaged in the business of producing and marketing original anthologies of recorded music. In producing these anthologies only music that was recorded or "fixed" prior to February 15, 1972, was utilized. These

recordings were based on *compositions* protected by the copyright laws. With respect to all such copyrights Heilman and E-C Tape tendered the two cents per copy royalty in compliance with 17 U.S.C. sec. 1(e). They tendered in excess of $150,000.00 to the publishers of musical compositions for compositions re-recorded by E-C Tape. (App. 109.)

Prior to entering into this business activity Heilman sought the advice of counsel concerning its legality. All of the attorneys he consulted advised him that, if he paid or tendered payment of the compulsory license fee or royalty provided for at 17 U.S.C. sec. 1(e). to the composition copyright owner, his duplication of musical recordings would not be in violation of the copyright law. (App. 102, 125, 127-136.)

In October, 1971, Congress amended the copyright law, effective February 15, 1972, and created a copyright interest in the sound recordings themselves. Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971). At the same time, Congress authorized criminal sanctions for unauthorized duplication of copyrighted recordings fixed after February 15, 1972, and for copying of existing recordings of copyrighted musical works where the statutory royalty is not paid to the holder of the musical copyright.

After passage of Pub. L. 92-140 Heilman again sought the advice of legal counsel, who advised him that sound recordings made or "fixed" prior to February 15, 1972, had not been afforded copyright protection by Pub. L. 92-140, and that, provided the statutory royalty was paid or tendered, the duplication of such recordings was not

unlawful. (App. 102, 124, 127-136.) The Criminal Division of the United States Justice Department was of the same opinion, publishing in April, 1973, a pamphlet entitled "Copyright Protection of Sound Recordings", in which it declared that the unauthorized duplication of sound recordings "fixed" prior to February 15, 1972, was not unlawful, (App. 103-104.)

At about the same time the United States Supreme Court reviewed 17 U.S.C. sec. 1(e), as amended, to determine whether or not Congress had pre-empted state legislation granting copyright protection to sound recordings fixed prior to February 15, 1972. The Court concluded there was no federal copyright protection for such recordings and, therefore, the state law in question was proper, *Goldstein v. California*, 412 U.S. 546, 568, 571 (1973). In reaching this conclusion the Court discussed the extent of the *composition copyright* interest and determined that "composers were to have *no control* over the *recordings* themselves", Id. at 566 (emphasis added).

Subsequently, on September 3, 1976, Congress, once again amending 17 U.S.C. sec. 1(e), Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976), for the first time expressed an understanding that the unauthorized duplication of sound recordings "fixed" prior to February 15, 1972, might not have been lawful. Congress changed the law with respect to the statutorily provided compulsory license provided for copyrighted musical works, to make it clear that persons were not to be entitled to the compulsory license for the purpose of making unauthorized duplications of musical sound recordings.

Heilman was an active and vocal opponent of these changes in the copyright law and he lobbied vigorously against them. He also wrote to the Justice Department to protest its change in position regarding the duplication of sound recordings fixed prior to February 15, 1972. (App. 122-123.) In February, 1975, several days after he had written his protest letter to the Justice Department that Department sent a memorandum to the local office of the Federal Bureau of Investigation requesting that Heilman's business be investigated (App. 121.).

On March 31, 1977, a criminal indictment was filed against Heilman in the Northern District of Illinois. This indictment alleged that when David Heilman, two years earlier, on May 15, 1975, duplicated certain sound recordings that had been fixed prior to February 15, 1972, he had committed a criminal act, notwithstanding that he had paid or tendered payment of the compulsory royalty or license fee provided for at 17 U.S.C. sec. 1(e). This prosecution resulted in the misdemeanor convictions that are the subject of the instant appeal.

Reasons For Allowance Of The Writ.

I. DAVID HEILMAN WAS CONVICTED UNDER A LAW WHICH IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The American criminal justice system provides for persons to have the right to know what actions constitute criminal behavior. It is incumbent upon legislatures to draft statutes that are clear and unambiguous when

they would make certain conduct a crime. David L. Heilman is charged with criminal violation of the copyright law. In duplicating records fixed prior to February 15, 1972, Heilman relied on his tendering of the compulsory licensing fee to be in full compliance with the law. The Justice Department shared this view of what constituted compliance as late as June, 1974.[1] It was only after rulings by divided Appeal Courts in four circuits that the Justice Department changed its interpretation of the statute, and the instant prosecution was initiated.[2]

Criminal statutes are subject to strict interpretation. *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971). Vague and indefinite statutes fail to meet the fair warning requirement that is embodied in the Due Process Clause of the Constitution. *United States v. Harriss*, 347 U.S. 612, 617 (1954). If offenses can be made constitutionally definite by a reasonable construction of the statute, the Supreme Court has said it is "under a duty to give the statute that construction". Id. at 618.

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[1] Correspondence of Assistant Attorney General Murphy in response to questions by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee of the Judiciary, regarding Senate Bill 3976, subsequently enacted into law as P.L. 93-573; Memorandum No. 798-Subject: Sound Recording Piracy — Violations of 17 U.S.C. 174, to all United States attorneys (App. 104).

[2] *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972), cert. denied, 409 U.S. 847 (1972); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 488, aff'd on rehearing en banc, 497 F.2d 492 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3rd Cir. 1974, as amended 1975), cert. denied, 421 U.S. 1012 (1975); *Lone Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir. 1975), cert. denied, 423 U.S. 841 (1975).

Unfortunately, the Supreme Court has chosen not to interpret the statutory language at issue here. It denied certiorari in all four circuit court cases, cases which were decided by divided courts. "Similar use", though defined by a number of judges, has not received construction by the Supreme Court, construction necessary to provide definiteness and validity for the statute. (Indeed, that language was not construed by the District Court in the declaratory ruling action, nor by this Seventh Circuit Court of Appeals, until after criminal charges had been filed against Heilman.)

Indefiniteness in federal criminal statutes is constitutionally objectionable in that not only does it deprive one of the right to be informed of what constitutes criminal activity, but also, it in effect delegates to judges and juries the legislative power to determine what acts will be criminal. *United States v. L. Cohen Agency*, 255 U.S. 81, 89 (1920). The present case is an illustration of judicial lawmaking. Four divided Circuit Courts interpreted the phrase "similar use". The trial court below then applied the majority's interpretation to impose criminal sanctions on Heilman for his activities on May 15, 1975. On that date only two of the four cases had been concluded.[3] The definition of "similar use" and the applicability of compulsory licensing had not yet been decided. In fact, it was not until 1976 that Congress clarified that language and specifically made activity such as Heilman's criminal. If such activities

[3] *Duchess Music Corp.*, cert. denied October 10, 1972.
Edward B. Marks Music Corp., cert. denied January 20, 1975.

were illegal prior to the 1976 amendments, as the trial court has held, why did Congress see fit to amend the law specifically to make such actions illegal?

Retroactive application of statutory interpretation also constitutes a deprivation of the right to due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Until the decisions of the Circuit Courts began to appear, the tendering of the compulsory licensing fee generally was considered to satisfy legal requirements for duplication of records fixed prior to February 15, 1972. (App. 103-105.) Following several of the Appeals Court decisions, the compulsory licensing fee suddenly became not available for duplication of records fixed prior to February 15, 1972. Retroactive application of a disputed standard in a criminal prosecution is a clear denial of Heilman's rights.

The law under which Heilman was indicted is vague and uncertain. This proposition is supported by the congressional action taken in 1976 to clarify it. Criminal sanctions were imposed upon Heilman for alleged violation of an indefinite, vague statute. This clearly constituted a denial of due process. The conviction should be overturned.

II. AS A MATTER OF FACT AND AS A MATTER OF LAW, HEILMAN WAS NOT GUILTY OF A WILLFUL VIOLATION OF THE COPYRIGHT ACT.

A. Heilman's actions demonstrate a clear desire to comply with all provisions of the copyright act.

The record in the present case is very clear. Heilman made every possible attempt to ascertain any and all restrictions the copyright laws imposed upon his activities as a duplicator and vendor of re-recorded music. All of his activities were done publicly, with the understanding, supported by attorney opinions, that his actions were legal.

Heilman acted in good faith. He sought the advice of counsel. He notified the holders of copyrights whenever he intended to make use of the compulsory licensing provision of the Copyright Act. He tendered the statutory fees for the licensing. He used only records fixed prior to February 15, 1972 in producing musical anthologies. He complied in all respects with the law as he had been advised by his attorneys. He lacked the willful intent necessary to violate the law.

This case involves a criminal prosecution. The statutory language is clear that copyright infringement must be committed "willfully" in order to be subject to criminal penalties. 17 U.S.C. 104. Although, in the civil context, there is strict liability for copyright infringement, "the criminal law casts a smaller net". *United States v. Bily*, 406 F.Supp 726, 733 (E.D. Pa. 1975). In order to convict Heilman of criminal violations of the Copyright Act, the government must show that Heilman infringed copyrights of others, and that these infringements were willful. Assuming *arguendo* that Heilman did commit copyright infringement, the element of *willful* infringement is lacking. Heilman may be civilly, but he cannot be criminally, liable.

Any federal statute containing the word "willfully"

requires a showing of specific intent to violate the statute. In *United States v. Mongiello*, 442 F.Supp. 835 (E.D. Pa. 1977), the court observed that "willfully" requires that "specific intent must be proved beyond a reasonable doubt in order to obtain a conviction". *Id.* at 838. Specific intent requires an element of bad or evil purpose. The government must prove that the Defendant knowingly did an act the law forbids. *United States v. Haldeman*, 559 F.2d 31, 114 (D.C. Cir. 1976), cert. denied sub nom. *Ehrlichman v. United States*, 431 U.S. 933 (1977).

In the present case Heilman could not knowingly have performed an act the law forbids. He acted on his attorney's advice that he was acting within the law. Heilman had no bad or evil purpose. He complied with the law as it generally was understood and interpreted at the time.

In testimony at trial Thomas M. Kells, one of Heilman's attorneys, stated his advise to Heilman:

> ". . . that as long as he paid the two cents, I could not see how he was infringing upon the rights of the copyright holder because, again, the copyright holder is entitled to one thing; that is the payment of the royalty or the compulsory licensing fee. And as long as he did that, I could not see anything wrong with it from a criminal standpoint". Excerpt of Proceedings at 49-50 (January 30, 1979).

Attorney Robert Sosnay testified that in May of 1975, the time of the alleged violations, he had advised Heilman:

> ". . . it was my opinion that as long as Mr. Heilman complied with the compulsory license and all of its provisions and did

not re-record any records that were fixed after 1972 and also complied with several civil injunctions that were pending — that I felt that he would be acting within the law as I knew it". Excerpt of Proceedings at 6 (January 30, 1979).

In *United States v. Critzer*, 498 F.2d 1160 (4th Cir.1974), the court found, in a tax conviction case, that if a law is vague or debatable, a defendant actually or imputedly lacks the requisite intent to violate it. The Court rejected Critzer's arguments with respect to tax exempt income, but overturned the conviction on the basis that the "requisite intent to evade and defeat" the law was missing. 498 F.2d at 1162. Heilman's actions are uncontroverted and they demonstrate a desire to comply with the provisions of the law. His conviction should be overturned.

B. A review of the history of the copyright act demonstrates that a willful violation of the law was impossible.

A finding that Heilman is guilty of criminal copyright infringement must be based on a showing that Heilman intended to violate the provisions of the Copyright Act. A review of the history of the copyright law shows that such intent was not possible. Congress itself did not define what constituted illegal activity until after Heilman had done that which was the basis for his conviction.

This present case is concerned with the law applicable to activities pursued prior to January 1, 1978,

the effective date of the copyright law revision of 1976.[4] The copyright revision is not applicable to such activities.[5]

In 1909 Congress extended the copyright protection of a musical composer to recordings of his composition, but conditioned that protection upon the granting of a compulsory license.[6] Accordingly, the law as it existed before the enactment of the Sound Recording Act of 1971, Public Law 92-140, 85 Stat. 91 (October 15, 1971), was as follows:

"(1) The composer or publisher was entitled to a composition copyright which included mechanical reproductions of his composition, 17 U.S.C. sec. 1 (e);
(2) No copyright existed with respect to the mechanical reproductions themselves, i.e., records, piano rolls, tapes; only the compositions used in the records or tapes were protected;
(3) Once the owner of the composition copyright allows another to mechanically reproduce the musical work any other person may make a 'similar use' of the composition upon the payment of two cents (per copy) to the composition copyright holder, 17 U.S.C. sec. 1(e);
(4) No criminal action would lie with respect to infringement of the composition copyright by unauthorized mechanical reproduction, 17 U.S.C. sec. 101(e)." *Heilman v. Levi*, 391 F. Supp. 1106, 1109 (E.D. Wis. 1975).

[4]Pub. L. 94-553, 90 Stat. 2541, 2598-2599, sec. 102. (October 19, 1976); U.S. Code Congressional and Administrative News, 94th Cong., 2d Sess., pp. 2541, 2598, 2599.

[5]Id., sec. 112.

[6]"And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured. . . ." 17 U.S.C. sec. 1(e).

In 1971 Congress amended the copyright law. It extended protection to sound recordings and made it a crime to duplicate records fixed after February 15, 1972. Additionally, the amendment made "criminal sanction immediately available to prevent piracy of already existing recordings of copyrighted musical works *where the pirate does not pay the statutory royalty* to the holder of the musical copyright".[7] Congress made duplication of recordings fixed prior to February 15, 1972 a crime only in the event the statutory royalty was not paid or tendered.

It was not until September 3, 1976 that Congress, in again amending the copyright law, for the first time expressed an understanding that Heilman's action in creating musical anthologies by duplicating records fixed prior to February 15, 1972, might be unlawful. Stating that its 1976 Amendments dealt with "three doubtful questions under the present law", it went on to say:

> "The basic intent of *this sentence is to make clear that a person is* not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d. 5th, 9th and 10th Circuits. . . ."[8]

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[7] H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. 9 (1971) (emphasis added).
[8] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 107-108 (1976) (emphasis added).

This Congressional clarification came too late for David Heilman!

Until January 20, 1975, activities such as Heilman's were "legal" in the eyes of the Justice Department. (App. 103-104.) On that date, the U.S. Supreme Court denied certiorari in the case *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, supra, and the Justice Department announced that henceforth persons selling duplicates of records fixed prior to February 15, 1972 would be subject to prosecution.

Heilman sought a declaratory judgment in the United States District Court for the Eastern District of Wisconsin, stating that his activities did not constitute a violation of the copyright law. While that action was pending, an indictment was filed in the United States District Court for the Northern District of Illinois, for criminal copyright infringement. If the law is not clear, how can one willfully violate it?

What number of judicial decisions is necessary before an interpretation becomes the law? Is it not the role of Congress to enact specific, definite laws? Congress did not "make clear" its intent regarding a "doubtful" question of copyright law until after David Heilman had done the acts which now are alleged to justify a criminal prosecution. He should not be required to endure punishment as a criminal. As a matter of law, he could not have had the criminal intent necessary to commit the crime of which he is accused.

III. DAVID HEILMAN IS A VICTIM OF A SELECTIVE PROSECUTION.

Defendant David Heilman is one of thousands who was in the business of re-recording selections of popular music. He is the *only* person in the United States to face criminal prosecution for duplicating sound recordings fixed prior to February 15, 1972. Excerpt of Proceedings at 12 (January 30, 1979) (statement by prosecutor).

Heilman is one of the few persons who have been vocal in their opposition to the government's actions in copyright protection of sound recording matters. He has been an outspoken critic of the recording industry and has taken positions against both the government and the industry. He has lobbied the Congress in opposition to industry sponsored legislation (App. 107-109, 122-123), and he even wrote to the Justice Department protesting its change in position regarding the meaning of the language of the copyright law. Significantly, unlike any other misdemeanor prosecution, the criminal investigation and prosecution of Heilman was initiated not at the local level but in Washington, only a few days after he had written the Department to protest its action. (App. 121.)

Equal protection of the law is denied when the government enforces a statute in a discriminatory fashion. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). Although a statute, on its face, may be non-discriminatory, it is possible for equal protection to be denied by the fact that the statute is enforced with respect only to a select few, or, as in the present case, only one. Although it is well established that the prosecutor may exercise discretion in deciding which violations he wishes to prose-

cute, *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *United Sates v. Cowan*, 524 F.2d 504 (5th Cir. 1975), such may not be based upon impermissible grounds such as race, religion, or the exercise of one's First Amendment right to free speech. *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

Heilman is entitled to dismissal of the charges against him if he can show that the government purposely discriminated against him for exercising his First Amendment rights. *Steele*, supra. A defendant who establishes a prima facie case of selective prosecution is entitled to a full evidentiary hearing. *Falk*, supra. To establish a prima facie case of selective prosecution Heilman must demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct, and that the government's selection for prosecution was based upon impermissible grounds such as race, religion, or the exercise of the First Amendment right to free speech. *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978); *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974).

It is undisputed that Heilman is the only person ever prosecuted for duplicating musical recordings fixed prior to February 15, 1972. It is equally uncontroverted that *he is one among many persons who engaged in this activity*. (App. 107.). It is clear that the Justice Department chose to prosecute Heilman for alleged copyright violations and chose not to prosecute any others. The singling out of David Heilman for prosecution is suspect.

In addition to being President of E-C Tapes, Inc. and

a duplicator of sound recordings fixed prior to February 15, 1972, David Heilman was an outspoken lobbyist on behalf of so-called "record pirates". He was an activist who spoke out often and loudly against the recording industry and its attempts to exert total control over the production of musical tapes and records. He also spoke out against the government and its cooperation and compliance with the recording industry. Heilman exercised his First Amendment right to free speech in openly expressing his views on so-called "record piracy" laws, and as a result he has been rewarded by being chosen by the government to be the only person ever prosecuted for copyright infringement of records fixed prior to February 15, 1972.

Heilman specifically alleged in his Affidavit of May 12, 1977, that, "in all of the aforesaid investigations [those prior to October 31, 1974] *and investigations made thereafter*, not one 'tape pirate', other than defendant in this action, has been criminally prosecuted for the re-recording or sale of musical compositions originally recorded prior to February 15, 1972, where the compulsory license fee was tendered". (App. 107). Thomas Gramuglia, in an Affidavit executed on April 30, 1977, at pp. 2-3, stated that, "to the best of his knowledge and belief, there has never been a prosecution for the re-recording of musical compositions . . . until 1977", when Heilman was indicted. (The Gramuglia Affidavit was attached as Exhibit F to Heilman's Affidavit of May 12, 1977 (App. 107).)

At the same time, however, other persons were duplicating records fixed prior to February 15, 1972, without being prosecuted. Compare *Pearl Music Co. v. Recording industry Association of America, Inc.*, 460 F. Supp. 1060, 1063-1064, 1066 (C.D. Cal. 1978) with Excerpt of Proceedings at 12 (January 30, 1979) (statement by prosecutor in this case).

Despite the existence of many who duplicated such recordings in a like fashion, Heilman was the *only* one prosecuted. This is a prima facie example of selective prosecution. The Circuit Court erred in failing to recognize such and provide Heilman with an evidentiary hearing.

Assuming *arguendo* the validity of the statute under which Heilman is charged, the selection of the outspoken Heilman as the only person ever to be so charged raises the critical question of selective prosecution. The undisputed facts of this case establish, at the very least, a prima facie case of selective prosecution. The charges against Heilman should be dismissed on the grounds that he has been denied equal protection under the law. In the alternative, the conviction should be vacated and the case remanded to the trial court for an evidentiary hearing on the issue of selective prosecution.

CONCLUSION

David Heilman has been convicted of willful criminal conduct for engaging in an activity that his lawyers had every reason to advise him was lawful, prior to Congress' clarification and amendment of the copyright law to make it criminal and even before it judicially was declared to be unlawful in this circuit, on the basis of a misdemeanor prosecution initiated in Washington. His conviction should be overturned, or, in the alternative,

the case should be remanded to the District Court for an evidentiary hearing regarding the Justice Department's selection of him for prosecution.

Respectfully Submitted,
LAWTON & CATES

BRUCE F. EHLKE
Attorney for
David L. Heilman

ADDENDUM

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Public Law 92-140
92nd Congress, S. 646
October 15, 1971

An Act

85 STAT. 391

To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code is amended in the following respects:

Sound recordings. Copyright. Limitations. 61 Stat. 652; 66 Stat. 752.

(a) In section 1, title 17, of the United States Code, add a subsection (f) to read:

"To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings."

Copyright notice, form. 68 Stat. 1032.

(c) In section 19, title 17, of the United States Code, add the following at the end of the section: "In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided*, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice."

Notice, location.

(d) In section 20, title 17, of the United States Code, amend the first sentence to read: "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

Definitions.

(e) In section 26, title 17, of the United States Code, add the following at the end of the section: "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds

Supra.

other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts

85 STAT. 392

of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions', and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

61 Stat. 652. 17 USC 1. Infra. Copyrighted music, unauthorized use. 61 Stat. 661.

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice."

Notice.

Effective dates.

SEC. 3. This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

Approved October 15, 1971.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-487 (Comm. on the Judiciary).
SENATE REPORT No. 92-72 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 117 (1971):
Apr. 29, considered and passed Senate.
Oct. 4, considered and passed House, amended.
Oct. 6, Senate agreed to House amendments.

TITLE 17 UNITED STATES CODE

COPYRIGHTS

(AS AMENDED OCTOBER 15, 1971)

§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically

the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording

in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

. . . .

(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

. . . .

§ 104. Willful infringement for profit

Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court: *Provided, however*, That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit. July 30, 1947, c. 391, § 1, 61 Stat. 652.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 19

Case No. 79-1577

United States of America,

Plaintiff-Appelee

vs.

David L. Heilman,

Defendant-Appellant.

Appendix to Petition for Writ of Certiorari

BRUCE F. EHLKE

LAWTON & CATES
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Petitioners

GUILD PRINTING MADISON WIS

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DATE FILED DOCKET ENTRY

3/31/77 Filed Indictment.

3/31/77 Order Indictment returned in open court: to issue bench warrant and set bond at $10,000.00 (10% Secured). PARSONS, C. J.

3/31/77 Issued Bench Warrant to the U. S. Marshal with copy of the Indictment.

4/ 4/77 Filed letter dated April 1, 1977 from the Eastern District of Wisconsin re; defendant being arrested in that district pursuant to warrant issued by this court.

4/ 7/77 Filed Notice of Arraignment and plea set for April 12, 1977, at 2:00 p.m.

4/15/77 Enter order dated April 12, 1977: Defendant with Federal Defender staff attorney enters a plea of NOT GUILTY. Counsel directed to hold 2.04 conference on or before May 2, 1977. Defendant is given until May 12, 1977 to file any pretrial motions and the government's response thereto is due May 17, 1977. Cause set for status report and for ruling on trial motions on May 20, 1977 at 10:00 a.m. Cause set for trial on June 6, 1977 at 10:00 a.m. Defendant's bond enlarged to permit travel out-

side of the Northern District of Illinois. — Flaum, J.

4/15/77 Issued two (2) certified copies of order above to the U.S. Marshal.

4/21/77 Filed papers received from the Eastern District of Wisconsin, consisting of Magistrate docket 77-54M and Appearance bond in the amount of $10,000.00 — 10% rec. no. 260276.

5/11/77 Filed appearance of Thomas M. Kells as attorney for the defendant; notice of motion and motion; affidavit and affidavit of mailing.

5/17/77 Filed Government's Response to Defendant's Motions To Transfer, To Dismiss the Indictment, For An Order To Inspect Grand Jury Testimony, For An Extension of Time To Dismiss The Indictment, For An Order To Inspect And Copy Material And Exculpatory Evidence, And For A Bill of Particulars.

5/18/77 Enter order dated May 17, 1977: The Government's time to respond to defendant's pretrial motions is extended to and including May 23, 1977. Cause set for ruling on pretrial motions on May 27, 1977. — Flaum, J. Mailed notices 5/18/77.

5/12/77 Filed defendant Heilman's notice of motion and motions to transfer case to Eastern District of Wisconsin with memorandum and points of authorities; motion to dismiss; motion for an order to inspect grand jury testimony; motion to inspect and copy material; motion for bill of particulars; and affidavit.

5/18/77 Filed letter to Judge Flaum from Mrs. Gail Stoney, dated May 14, 1977 re: signing an affidavit.

5/20/77 Filed Defendant's Response to Government's Request For An Order Extending time to Response to Defendant's Motions with affidavit of mailing attached.

5/24/77 Filed Government Response to Defendant's Motion To Transfer Case from this District to the Eastern District Of Wisconsin.

5/27/77 Filed Defendant's supplemental memorandum and points of authorities .

6/ 3/77 Enter order dated May 27, 1977: Defendant's pretrial motions are taken under advisement. Ruling to be made by mail. FLAUM J.
Mailed notices 6/3/77.

6/ 7/77 Enter order dated May 27, 1977: Defendant's motion to transfer this cause to the Eastern District of Wisconsin pursuant to

Fed. R. Crim. P. 21 is hereby denied. The Indictment alleges thirty-six separate offenses each of which are alleged to have occurred in whole or in part in the Northern District of Illinois. The defendant's pending civil case in the Eastern District of Wisconsin is unrelated to this cause. FLAUM J.
Mailed notices 6/7/77.

6/ 6/77 Filed Government response to defendant's several pretrial motions.

6/ 7/77 Enter order dated June 6, 1977: Government granted leave to file instanter its response and supporting memorandum to defendant's pretrial motions. FLAUM J.
Mailed notices 6/7/77.

6/13/77 Enter order dated June 6, 1977: (a) The above-captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be reassigned by lot to another judge of this Court. The reasons for my recommendation are indicated on the reverse of this form. FLAUM J.
Mailed notices 9/13/77.

It is hereby ordered that the Clerk of the Court reassign the above-captioned cause by lot to the calendar of an individual

judge of this court in accordance with the rules. PARSONS C.J. — SEE ITEM NO. 17
Mailed notices 6/13/77.

6/14/77 Enter order dated June 10, 1977: In view of this Court's recusal in this cause, the Court's denying defendant's motion to transfer is hereby stricken. — FLAUM, J.
Mailed notices 6/14/77.

6/17/77 Enter order dated 6/16/77: Cause having been reassigned to Judge Grady, it is ordered that a status report will be held on June 29, 1977 at 2:00 p.m. GRADY, J.
Mailed notices 6/17/77

7/ 7/77 Enter order dated 6/29/77: Status hearing held. Defendant is given until July 14, 1977 to reply to all motions filed. Motions will then be taken under advisement. Defendant to file supplemental memorandum on the issue of venue on or before July 11, 1977. GRADY, J.
Mailed notices 7/7/77

7/15/77 Filed notice of motion and motion regarding motions previously made by defendant.

7/15/77 Filed defendant's reply to government's response to defendant's pre-trial motions.

7/15/77 Filed memorandum of points and authorities regarding evidentiary hearing.

8/18/77 Filed government's response to defendant's notice & reply on pre trial motions.

8/31/77 Filed affidavit of David L. Heilman and Barbara Heilman.

9/16/77 Filed Motion for dismissal for prosecutor misconduct under Rule 32 B or in the alternative motions for — Mail cover information, Brady material being withheld Copies Internal advisory memos, Injunction against Justice Department for using civil discovery in this criminal action.

10/11/77 Filed points and authorities in support of motion.

11/ 1/77 Filed Government's reply to defendant's motion for an evidentiary hearing.

11/ 1/77 Filed Government's reply to defendant's motion for an evidentiary hearing.

11/11/77 Filed brief in support of motions for evidentiary hearings. (SENT TO JUDGE.) .

12/22/77 Filed further response of government to defendant's pre-trial motions.

2/15/78 Enter order dated 2/13/78: This case is on trial call which will commence 2/21/78. The cases will be tried in the order listed on the call. Counsel will be expected to follow the progress of the call and to be

ready for trial when called. — Grady, J.
Mailed notices 2/13/78

2/16/78 Filed further response of defendant in support of pre-trial motions.

2/16/78 Filed Exhibit I — "Petition for hearing". from the Supreme court — State of California.

2/16/78 Filed Exhibit II, "Decision on Demurrer". From the state of Wisconsin, Civil Division # 405-986.

3/15/78

delay resulting from pre-trial hearings began on 5/12/77
and ended on 7/15/77. GRADY, J.
Mailed notices 3/15/78.

3/15/78 Enter order dated 3/10/78: Excludable delay while defendant motion under advisement began on 5/27/77 and ended on 6/26/77. GRADY J.
Mailed notices 3/15/78.

3/15/78 Enter order dated 3/10/78: Excludable delay resulting from pretrial hearings began on 9/16/77 and ended on 2/16/78. GRADY, J.

3/13/78 Filed government's response to defendant's request for disclosure of any electronic survellance.

3/13/78 Filed letter dated 3/7/78 from defendant's attorney re change of address — 735 W. Wisconsin Avenue, Mil. Wisconsin 52233.

4/11/78 Further response of the government to certain of defendant Heilman's pretrial motions.

4/26/78 Filed Motion to dismiss indictment because of continuing government taint, with affidavit.

4/21/78 Filed defendant's response to government's response of April 11, 1978.

5/ 1/78 Enter order dated 4/26/78: Defendant's motion to transfer to the Eastern District of Wisconsin is denied. Defendant's motion in regard to disclosure of electronic surveillance has been complied with by the government. All the remaining pretrial motions of defendant are denied. No further pretrial motions shall be filed without leave of court. The parties shall be ready for trial upon reasonable notice any time after July 1, 1978. DRAFT. GRADY, J.
Mailed notices 5/1/78.

5/ 3/78 Filed government's notice re motion to set trial date after July 31, 1978.

5/ 4/78 Enter order dated 5/3/78: On government's motion, the ready date for trial of this case is continued until after August 14, 1978. GRADY J.

Mailed notices 5/4/78.

8/ 9/78 Filed Motion to stay the trial pending a decision in the appeal of Case No. 77-1968.

8/10/78 Enter order dated August 9, 1978: Without objection, the motion of the defendant to stay the trial in this matter pending a decision in the appeal of Case No. 77-1968, David Heilman v. Griffin Bell is granted. GRADY, J.
Mailed notices 8/10/78.

10/02/78 Enter order dated September 27, 1978: Status hearing set on December 19, 1978 at 9/45 a.m. Trial set on January 8, 1979 at 10:00 a.m. GRADY, J.
Mailed notices 9/28/78.

9/27/78 Filed notice in re: Government's motion to set trial date for purpose of issuing trial subpoenas.

9/27/78 Filed government's motion to set trial date for purpose of issuing trial subpoenas.

12/20/78 Enter order dated December 19, 1978: Status hearing held. Trial date set for Jan. 8, 1979 to stand. GRADY, J.
Mailed notices Dec. 20, 1978.

1/ 9/79 Enter order dated Jan. 8, 1979: Trial set for this date is stricken. Status hearing set for Tuesday, January 9, 1979 at 9:45 a.m. GRADY J.

Mailed notices 1/9/79

01/10/79 Filed 1/09/79 Government's Stipulation.

01/10/79 Filed 1/09/79 Defendant's stipulation.

01/10/79 Filed 1/09/79 Defendant's waiver of trial by Jury.

01/10/79 Filed 1/09/79 Appearance of attorney Marcus as attorney for the defendant.

01/10/79 Filed 1/09/79 Defendant's substitution of attorneys.

01/10/79 Enter order dated January 9, 1979/ Status hearing held. Substitution of attorneys granted. James I. Marcus, in the place and stead of Thomas M. Kells, withdrawn. Waiver of trial by Jury, is executed and approved by the Court. Trial set for January 30, 1979 at 11:00 a.m. GRADY, J.
Mailed notices Jan. 10, 1979.

02/01/79 Enter order dated January 30, 1979: Trial begins — Bench. Waiver of trial by jury here-to-fore executed. Evidence presented. Both sides rest. Trial adjourned to Wednesday, February 7, 1979 at 4:00 P.M. The Court dismisses Counts 27 through 36. GRADY, J.
Mailed notices Feb. 1, 1979.

02/08/79 Filed 2/7/79 United States Memorandum of law.

02/08/79 Filed 2/7/79 Defendant's memorandum in support of Defendant's argument that the requisite intent to violate the copyright statute 17 USC, Section 104, was lacking.

02/08/79 Enter order dated February 7, 1979: Trial held-Bench. Final arguments concluded. Trial ends. Court finds deft. Guilty counts 1, 4, 7, 9, 11-17, 19, 21-26. Court enters judgment of guilty counts 1, 4, 7, 9, 11-17, 19, 21-26. Order cause referred to the probation department for a presentence investigation. Sentencing set for March 21, 1979 at 2:00 p.m. Same bond to stand. On the govt's oral motion Counts 2, 3, 5, 6, 8, 10, 18 & 20 dismissed. GRADY, J. Mailed notices Feb. 8, 1979.

02/09/79 Filed Clerk's File Copy of Transcript of Proceedings had before Judge Grady on Tuesday, January 30, 1979 consisting of one volume.

03/22/79 Enter order dated March 21, 1979: Defendant sentenced to imprisonment for a period of SIX (6) MONTHS on counts 1, 4, 7, 9, 11-17, 19, and 21-26. Said counts to run concurrent to each other. IT IS FURTHER ORDERED that the defendant is fined in the sume of FIVE HUNDRED ($500.00) DOLLARS on each of counts 1, 4, 7, 9, 11-17, 19 and 21-26. Fine to run cumulatively for a total fine

of NINE THOUSAND ($9,000.00) DOLLARS payable within ONE (1) YEAR. IT IS FURTHER ORDERED that Execution of Sentence is stayed pending appeal. Present bond to stand as appeal bond. — DRAFT) GRADY, J. JS-3
Mailed notices Mar. 22, 1979.

03/23/79 Filed 3/22/79 notice of appeal.

03/23/79 Mailed copies of notice of appeal to the U. S. Marshal, U. S. Attorney, Attorney for the defendant, Probation Department, and U. S. C. A. 7th Circuit.

03/27/79 Issued two certified copies of J & C to the U. S. Marshal and two copies to the Probation Dept. and one copy to the Fiscal Dept.

03/28/79 Filed 3/28/79 Appearance from USCA, 7th Circuit, docket number 79-1301.

APPENDIX

101

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
-vs-	)	AFFIDAVIT
	)	
DAVID L. HEILMAN	)	No. 77-CR-323

STATE OF WISCONSIN)
:SS
MILWAUKEE COUNTY)

David L. Heilman, being first duly sworn on oath, deposes and says:

1. That he is the defendant in this action and was at all times referred to herein an officer and director of E-C Tape Service, Inc.

2. That at all times referred to herein David L. Heilman acted solely in his capacity as an officer and director of E-C Tape.

3. That E-C Tape was incorporated in Wisconsin in 1970 and it became involved in the business of selling re-recorded music in early 1971, exclusively by mail order through the medium of advertising in publications with a national distribution and on a smaller scale through T.V. advertising.

4. That prior to entering into said business activity he

on his own behalf and that of E-C Tape sought the advice of counsel concerning the legality of said business, namely John Gower of Green Bay, Wisconsin, and the firm of Whyte & Hirschboeck, S.C. of Milwaukee, Wisconsin, and that each of them advised him that if he tendered for payment the statutory compulsory license fee to the copyright proprietor that the re-recording of said music was not in violation of any federal statute.

5. That E-C Tape at all times tendered payments to the copyright owners of musical compositions that it re-recorded and that such a finding was made by the Honorable William J. Lynch in E-C Tapes v. Kelly, (N.D. Ill., 1975) 412 F. Supp. 249.

6. That 17 USC was amended by P.L. 92-140, 17 USC 101(e) on October 15, 1971, and became effective on February 15, 1972, and created a limited copyright in sound recordings.

7. That he then again sought the advice of Whyte & Hirschboeck, S.C., who advised him that sound recordings originally made prior to February 15, 1972, were not afforded copyright protection under Federal Law and that P.L. 92-140 did not change this and that E-C Tape's activities were still not in violation of any federal law.

8. That neither he nor E-C Tape re-recorded nor offered for sale or sold any sound recordings originally recorded and fixed after December, 1971, and that said limitation was done on the

advice of counsel.

9. That the Government Regulations Section Criminal Division of the United States Department of Justice was of the same opinion when it published a pamphlet entitled Copyright Protection of Sound Recordings dated April, 1973, and that a copy of the text of said pamphlet and P.L. 92-140 are attached hereto as Exhibit "A" and made a part hereof as if set forth at length.

10. That within Exhibit "A" it is stated in part as follows:

a. (1), page 3: "A sound recording is eligible for copyright protection only if the sound recording is fixed and first published with the required statutory copyright notice on or after February 15, 1972. P.L. 92-140, Section 3.

Fixation. A series of sounds constituting a sound recording is fixed when that complete series is first produced on a final master recording from which copies can be made. 37 C.F.R. 202.15a(b).

Page 4: Effective date. The enactment does not apply retroactively and does not affect in any way rights with respect to sound recordings fixed before February 15, 1972. Thus, P.L. 92-140 does not prohibit the unauthorized copying of sound recordings fixed before February 15, 1972.

b. (2), page 9: First no Federal copyright violation can exist under P.L. 92-140 unless the sound recording copied was fixed and published on or after February 15, 1972. This automatically excludes such albums as 'Golden Hits of the 60's', 'Frank Sinatra's Greatest Hits' and 'White Christmas' by Bing Crosby, etc., which

were obviously fixed and published before February 15, 1972.

c. (1), page 13: To receive Federal copyright protection, a sound recording must be finally fixed and published with proper notice of copyright on or after February 15, 1972. Supra, Section c(1). Proof of fixation and publication may be provided by a recording industry representative."

11. That on June 3, 1974, the Department of Justice published Memorandum No. 798 to all United States Attorneys on the Subject: Sound Recording Piracy - Violations of 17 USC 104, a copy of which is attached hereto as Exhibit "B" and is made a part hereof as if set forth at length.

12. That Exhibit "B" makes specific reference to Exhibit "A" as still being the prosecutive policy of the Department of Justice as of June 3, 1974.

13. That Section 3 of P.L. 92-140 states in part as follows:

" . . . The provisions of Title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published and copyrighted on and after the effective date of this Act . . . and nothing in Title 17 . . . shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

14. That he relied upon the pronouncements of the United States Department of Justice and the wording of the Act itself in continuing in his business after February 15, 1972, and the

continuing advice of counsel after said date.

15. That he further relied upon the decision in Goldstein v. California, (1973) 412 U.S. 546, 37 L. Ed. 2d 163, 93 S. Ct. 2303, wherein the Court stated at page 558:

" . . . individuals who wish to purchase a copy of a work protected in their own State will be able to buy unauthorized copies in other States where no protection exists."

16. That he further relied upon Melville Nimmer's article in U.C.L.A. Law Rev. Vol. 22 1975, a copy of which is attached hereto as Exhibit "C" and made a part hereof as if set forth at length.

17. That on May 16, 1975, the F.B.I., pursuant to search warrant, seized numerous sound recordings owned by E-C Tape at its place of business in Lake Villa, Illinois.

18. That all counts of the indictment, excepting Count Thirty-Six, are based upon business records and materials seized on said date, and that the government had all necessary evidence on said date to prosecute him for the alleged violations.

19. That the indictment was not issued until some twenty-two and one-half months later on March 31, 1977, and that said delay on the part of the government to prosecute him was unreasonable and unconscionable and that he has suffered substantial prejudice for the following reasons:

a. That his assets have been depleted during said period of time by civil litigation with the record industry and he no longer has funds with which to defend himself which would have been available to him had the prosecution been brought on without unreasonable delay.

b. That said delay was part of a deliberate, purposeful and oppressive design for delay on the part of the government to hinder him in his defense of this action.

c. That he would have appealed the decision in E-C Tape v. Kelly, (N.D. Ill. 1975) 412 F. Supp. 249, had he known that the government intended to prosecute him criminally in the future.

20. That in the case of Heilman v. Levi, (E.D. Wis. 1975) 75 C 117 the government has argued that, in a motion for summary judgment, declaratory relief and an injunction should not be granted because the government never intended to prosecute him for copyright infringement.

21. When the action at hand was revealed to the Court in Heilman v. Levi, supra, the U.S. attorney wrote the letter attached hereto as Exhibit "D", and in effect stated that he did not intend to mislead the Court.

22. That the U.S. attorney in Gramuglia v. Levi, Case No. 75-CV-549 (N.D.N.Y.) made the same statement to the Court and

plaintiff's action was dismissed wherein he was seeking the same relief as was sought in Heilman v. Levi, supra, and that a copy of Thomas Gramuglia's affidavit is attached hereto as Exhibit "E" and made a part hereof as if set forth at length.

23. That in its brief to the United States Supreme Court in the case of Colorado Magnetics, Inc. v. Marks, No. 73-2006 (10th Cir.), in an amicus curiae brief the Solicitor General of the United States stated that between February 1, 1972 and October 31, 1974, the F.B.I. conducted 6,797 investigations of "tape piracy".

24. That in all of the aforesaid investigations and investigations made thereafter, not one "tape pirate", other than defendant in this action, has been criminally prosecuted for the re-recording or sale of musical compositions originally recorded prior to February 15, 1972, where the compulsory license fee was tendered.

25. That he has been vocal both legally and in lobbying in his opposition to the government and the record industry along with Thomas Gramuglia in regard to their positions on "record piracy".

26. That Thomas Gramuglia has stated said facts in his affidavit attached hereto as Exhibit "F" which is made a part hereof as if set forth at length.

27. That he has participated in various lawsuits for injunctions against the U.S. government: International Tape Distributors v. Levi, 188 U.S. P.Q. 539; Gramuglia v. Levi, (N.D.N.Y.) Case No. 75-CU-540; Heilman v. Levi, 391 F. Supp. 1106; Heilman v. Kelly, 412 F. Supp. 247.

28. That he has lobbied in Congress and written or spoken to all members of the United States Senate and the House of Representatives, see Exhibit "G" attached hereto and made a part hereof as if set forth at length, and on July 17, 1975, he spoke to the House Subcommittee on Copyright in which his testimony was printed in the House Hearings "Won't Get Fooled Again".

29. That he participated in the production of a pamphlet entitled "The Great American Rip-Off", which describes the interworking of the music industry.

30. That he lobbied in the State of New York and participated in the defeat of the Vermont Anti-Piracy Bill No. S-59, introduced by the R.I.A.A. and backed by the Criminal Division of the Justice Department, Washington, D.C., namely John Murphy, formerly with the Justice Department as Chief of the Criminal Division (and who is now employed by the R.I.A.A.) and Robert Weidner.

31. That he assisted in the producing of the pamphlet entitled "You Wouldn't Believe How Cheap It Cost To Buy The U.S.

Department of Justice", attached to Exhibit "F" herein, which was sent to various members of the Vermont legislature as well as to members of the U.S. Senate and House of Representatives.

32. That defendant as a user of the compulsory license provision must pay the full statutory rate of .02 per composition to the copyright proprietor on the total amount of records produced by him, which is not done by the recording companies.

33. That he has complied with the compulsory license provision U.S.C. 17 101(e) by filing the required notice of intentions with the copyright office and the publishers who purport to own or control the musical compositions and that he has tendered in excess of $150,000.00 to the publishers of musical compositions for compositions re-recorded by E-C Tape.

34. That in the last ten years the major recording companies have gained control of 80% of the major copyrights of musical compositions by purchasing the large publishing houses or exercising control in other ways.

35. That the majority of the publishers listed in the indictment are owned or controlled by the recording companies.

36. That some of the publishers listed in the indictment have accepted the compulsory license payment for use of the musical compositions by E-C Tape.

37. That many independent publishers have accepted thousands

of dollars in payments from E-C Tape for use of their musical compositions.

38. That the government and the record industry, through the R.I.A.A., have conspired against defendant in both civil and criminal matters. See Exhibit "B" attached hereto.

39. That defendant believes that the government failed to inform the grand jury of many relevant matters favorable to defendant and that unless he is able to inspect the minutes of the grand jury, he will be prejudiced.

40. That all the materials being used against the defendant are the property of E-C Tape of which he was an officer and employee at all times relevant herein.

41. That the government has not sought an indictment against E-C Tape who, if defendant is guilty of any crime, should also have been indicted.

42. If E-C Tape would have been indicted, defendant would have been able to receive all materials of E-C Tape in the possession of the government under the Brady rule, and that such materials are relevant to his defense.

43. That defendant believes that he is and has been under electronic surveillance by the government and that such materials discovered by the government should either be produced for his

defense or that the government should be denied their use.

David L. Heilman

Subscribed and sworn to before me
this 12 day of May, 1977.

Notary Public, Milwaukee County, Wis.
My Commission is Permanent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
-vs-	)	AFFIDAVIT
	)	
DAVID L. HEILMAN	)	No. 77-CR-323

TO: United States Attorney
Northern District of Illinois
Eastern District
Chicago, Illinois
Attention: Theodore Scudder, Esq.

STATE OF WISCONSIN	)
	:SS
MILWAUKEE COUNTY	)

David L. Heilman being first duly sworn on oath, deposes and says:

1. That he is the defendant in this action and is and was the President of E-C Tape Service, Inc., at all times referred to herein.

2. That he is and has been a resident of the State of Wisconsin at all times referred to herein; that he is married and that his wife and child reside with him in Brookfield, Wisconsin.

3. That E-C Tape Service, Inc. was and is a Wisconsin corporation since 1970 and was licensed to do business in the State of Wisconsin.

4. That at all times referred to herein David L. Heilman acted solely in his capacity as President of said corporation.

5. That the books and records of said corporation relating to the charges herein are voluminous and are presently located in Wisconsin, and that said records are necessary for the preparation and defense of this case.

6. That his present business activity is in the State of Wisconsin, and that he is presently involved in civil litigation in Milwaukee County with the record industry which requires his presence at all times, and that his present business and said legal matters in Wisconsin will be adversely affected if he has to travel to Chicago, Illinois, to defend this action.

7. That witnesses who will testify on his behalf are located in Wisconsin and the former employees of defendant reside in Wisconsin and will be called upon by defendant to aid in his defense.

8. That he does not have the financial ability to bear the expense of defending this action in Illinois, nor the means to pay for transportation, travel and housing accommodations of witnesses, his counsel or himself.

9. That his present assets are a 1963 Chevrolet automobile and his clothing and personal effects.

10. That his counsel resides in Milwaukee County, Wisconsin,

and that said counsel is the only one familiar with all of the affairs of defendant and that said counsel will represent him for a nominal fee.

11. That the witnesses for the United States reside in numerous States including Oregon, Alaska, California, Louisiana, Alabama, New York, Pennsylvania, Tennessee, Minnesota, Colorado and Puerto Rico, as well as Illinois and Wisconsin.

12. That if any of the alleged offenses were committed by defendant they were committed in numerous jurisdictions.

13. That all orders taken from the purchasers referred to in Counts Twenty-Seven through Thirty-Six, inclusive, were mailed to Brookfield, Wisconsin, a suburb of Milwaukee.

14. That he was arrested at his residence in Brookfield, Wisconsin, and resided there at the time that the grand jury was impaneled and the indictment issued.

15. That the trial of this matter is scheduled for two weeks but that he believes, based on other "tape piracy" cases, that it would be more realistic to state that it will last for five to seven weeks.

16. That if any of the alleged offenses were committed, they are only a small portion of the business of E-C Tape Service, Inc., and the majority of said alleged offenses would have been committed in the State of Wisconsin since late 1970.

17. That there is presently pending and has been pending since April, 1975, an action in the Eastern District of Wisconsin, entitled David L. Heilman, et al v. Edward H. Levi, Case No. 75-C-117, wherein the defendant herein has sought a declaratory judgment that 17 USC §1(e), §101(e) and §104 are inapplicable to duplicators of songs fixed prior to February 15, 1972; that said statutes are unconstitutional in criminal prosecutions involving songs fixed prior to February 15, 1972; and for injunctive relief.

18. That in July of 1976, each of the parties moved for summary judgment in said matter, and that briefs were submitted and oral arguments heard in February, 1977, by the Honorable John R. Reynolds, Chief Judge of the Eastern District of Wisconsin.

19. That Judge Reynolds has not as yet decided said matter.

20. That should Judge Reynolds decide in defendant's favor, the action herein would be moot.

21. That the Federal District Court of the Eastern District of Wisconsin first acquired jurisdiction of this matter.

Dated at Milwaukee, Wisconsin, this 10 day of May, 1977.

David L. Heilman

Subscribed and sworn to before me
this 10 day of May, 1977.

Notary Public, Milwaukee County, Wis.
My Commission is Permanent.

Exhibits to Affidavit — not printed.

DOCKETED

FILED

AUG 3 1977

N. STUART CUNNINGHAM
CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

DAVID L. HEILMAN,

Defendant.

AFFIDAVIT

No. 77 CR 323

D1

DAVID L. HEILMAN, being first duly sworn on oath, deposes and states that:

1. That he is an adult resident of Brookfield, Wisconsin and resides at 15660 Pomona Road.

2. That he is not an owner of Heil, Moyles & Mann Advertising.

3. That the Honorable William Lynch did direct the F.B. I. to return all tapes of non-musical recordings to DAVID HEILMAN. (See Exhibit A.)

4. That in April, 1977 he requested his F.B.I. file under the Freedom of Information Act.

5. That in August, 1977 the above party's file was received by HEILMAN containing 142 pages.

6. That among the documents received was Exhibit B which reveals that the government has perjured itself by stating that the R.I.A.A. had nothing to do with the indictment or investigation of defendant HEILMAN.

7. That Exhibit C was among the documents received by HEILMAN which indicates the amount of involvement between the Justice Department and the R.I.A.A.

8. That there exists many other documents in defendant HEILMAN's file which have been withheld by the F.B.I. and if released would support HEILMAN's allegations of conspiracy

and selective prosecution.

9. That HEILMAN is a defendant in a Wisconsin class action (Mercury Records, Inc. v. E-C Tape, Case No. 405-986) since December, 1972 of which all named and unnamed members of the class are members of the R.I.A.A.

10. That the attorneys for the Wisconsin class action are Howard S. Smith of Mitchell, Silberberg & Knupp of Los Angeles, California and Ronald Piette and Richard Florsheim and Steven Keane of Foley & Lardner of Milwaukee, Wisconsin.

11. That the R.I.A.A. has financed the civil litigation against HEILMAN and the R.I.A.A. continues to be an extra-judicial arm of the Criminal Division of the Justice Department.

12. That the R.I.A.A. through its representative Howard S. Smith did direct and request the investigation against HEILMAN in Chicago, Illinois.

13. That there exists a air mail letter from Howard S. Smith of the law firm of Mitchell. Silberberg & Knupp to the Chicago Office of the Justice Department which will prove the allegations of HEILMAN.

14. That HEILMAN did see this letter in a pre-conference meeting with Thomas Hosteny in the Chicago Office of the Justice Department.

WHEREFORE, the defendant, through his attorney, Thomas Kells, respectfully requests an evidentiary hearing on the conspiracy and selective prosecution issues be heard as soon as possible.

David L. Heilman
DAVID L. HEILMAN

Thomas M. Kells
THOMAS KELLS

Subscribed and sworn to before me
this 29 day of August, 1977.

Thomas M. Kells
Notary Public, State of Wisconsin

APPENDIX
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:3 28-574
25/jmp

By letter dated September 22, 1975, the Office of United States Attorney (USA) SAMUEL K. SKINNER, Chicago, furnished the following copy of minute order, dated September 16, 1975, with the Government's proposed findings and conclusions of law regarding the case entitled:

"E-C TAPE, INC., ETC., VS.
CLARENCE M. KELLY, aka,
ET AL, # 75 C 1693,
USDC, NDI."

SKINNER's letter directed that the Bureau return to the plaintiff all non-musical recordings and maintain care and custody of all other inventoried items until further order of the court.

AUSA THEODORE T. SCUDDER requested that the above described items be obtained from the inventory, but requested that they be held until asked for by E-C, as this would indicate to SCUDDER what efforts E-C was making to prepare its case. Upon request, these items should be furnished to E-C.

EXHIBIT A

APPENDIX
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-2-

The above information was collected for the Recording Industry Association of America by Mr. Thomas O'Brien of Factual Service Bureau, a private detective agency in Milwaukee, phone number 414-271-9481.

Please coordinate your actions with Assistant U. S. Attorney Theodore Scudder in Chicago.

EXHIBIT B

CG 28-574

By letters dated February 5, 1976, and June 7, 1976, DAVID HEILMAN, President, E-C Tape Service, Inc., 3695 North 126th Street, Brookfield, Wisconsin, was advised that the non-musical recordings ordered returned to him were being maintained at the Chicago Office of the FBI awaiting his contact to arrange for their return.

When no contact from HEILMAN was received, by communication dated November 12, 1976, these items were forwarded to HEILMAN.

For information, Lieutenant [redacted] Brookfield Police Department, advised that the vehicle of DAVID L. HEILMAN, 2825 North Pilgrim Road, Brookfield, had been observed at the residence of a known burglar in Milwaukee, Wisconsin. Lieutenant [redacted] was inquiring as to the status of a federal case involving HEILMAN; and if there was any indication that the subject might have out of state connections who could assist in fencing the stolen goods.

Lieutenant [redacted] was advised that the federal case developed no positive indication of such contacts by HEILMAN; that the federal violation under investigation was for Copyright and Mail Fraud violations connected with the duping of tapes.

On October 18, 1976, LARRY KAPLAN, Recording Industry Association of America (RIAA), New York, New York (telephone (212) 688-3778), telephonically advised the Chicago Office that he has received information from two attorneys in Milwaukee that E-C had been selling sound recordings at least through May, 1976. He was furnished with over 100 checks deposited by DAVID HEILMAN in the account of Games Unlimited at Security Bank, Milwaukee, Wisconsin, these checks all being made out to E-C Tapes. These attorneys are RON PIETTE (414-271-7070) and RICK FLORSHEIM, firm of Foley & Lardner (414-271-2400), both of Milwaukee, Wisconsin.

EXHIBIT C

Exhibit attached to brief in support of motion for evidentiary hearing, filed November 11, 1977.

UNITED STATES GOVERNMENT

Memorandum

TO: Director
Federal Bureau of Investigation

DATE: JCK:JLR:RPW:jmm
28-1683

FROM: John C. Keeney
Acting Assistant Attorney General
Criminal Division

SUBJECT: Request for investigation of Economic Consultants, d/b/a E-C Tape Service, and David Heilman for possible criminal copyright violations

Reference is made to our memorandum of January 30, 1975, concerning the unauthorized duplication of sound recordings embodying copyrighted musical compositions.

The Criminal Division requests that you initiate an investigation of the above-captioned subjects for criminal infringement of copyrighted musical compositions. E-C Tape Service and its principal, David Heilman, have engaged in the piracy of uncopyrighted sound recordings for a number of years. However, the sound recordings do embody copyrighted musical compositions.

Following a Wisconsin state court injunction against his activities, Heilman moved his manufacturing operation to a building in Gurnee, Illinois, a small town approximately 5 1/2 miles east of Lake Villa. The building is a warehouse of approximately 4,000 square feet in size. The only identification on the building is a sign which reads "Ray's Flooring". E-C Tape Service has rented the building since August of 1974. Semi and pick-up trucks have been seen driving to and from the building. Numbers for the telephone inside the building are 356-1511 and 1512.

According to an affidavit filed in civil litigation, E-C Tape Service still maintains a WATS number (800-558-0930) which rings in two locations in Wisconsin; 3695-G North 126th Street, Brookfield, Wisconsin; and 312 East Wisconsin Avenue, Milwaukee, Wisconsin. Orders received over this number are then called to the factory in Illinois.

EX-105 REC-7 MCT-39

EXP. PROC.

Plaintiff's EXHIBIT 4
Defendant's
DOROTHY M. WAGNER
COURT REPORTER
MILWAUKEE

18 FEB 27 1978

EXHIBIT A

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

190-6380-5

Exhibit 4 attached to Government's Stipulation, page 142 supra.*

Miscellaneous Exhibit, date filed unknown.

January 15, 1975

RECEIVED
JAN 20 [illegible]
CRIMINAL DIVISION

Henry E. Petersen
Assistant Attorney General
Department of Justice
Old Star Building
Washington, D.C. 20530

Dear Mr. Petersen:

I have read with great distress your Amicus Curiae brief to the U. S. Supreme Court in the case of Colorado Magnetics v. Edward B. Marks Music. I must repeat what Judge Gibbons stated in his comprehensive dissent in the Third Circuit Cou of Appeals, "We should not follow like the children of Hamel their erroneous piping". Copy enclosed.

You should be made aware that five companies control 55% of all major copyrights in the United States - C.B.S., R.C.A., E.M.I., W.E.A. and Polygram. The small independent publish have been squeezed out of the business in the exact manner t the 1909 copyright act attempted to stop. I am referring t enclosed copyright case that has been pending since June 19, Tennessee - Selman v. C.B.S. The music industry has buried important case because it lays the monopoly conspiracy at t doorstep of the five above mentioned companies.

You probably don't realize that a record company does not p for a copyright until an album is sold at full retail. Any thing sold at 50% or less wholesale does not pay copyright ties or artist royalties. The overall royalties to indepen are less than $.01 per song. Realize that an album costs b $.35 to produce. If it is closed out at $1.60, no royaltie paid to artists or copyright holders and huge profits are g ated. The user of the compulsory license provision must pa for each song manufactured whether he sells it or not.

The five giants control 90% of all manufacturing, distribu and sales in the United States. A person cannot have a hi without giving most of their publishing rights to the litt monopoly.

CERTIFIED

JAN 17 1975

Henry E. Petersen
January 15, 1975
Page 2

Your decision may have done more to destroy competition in the field of music ($2.2 billion in yearly sales) than any other factor in the last 20 years. I ask your assistance in the form of a rehearing.

1. Why should the music industry have control of old music (1929 to 1971) to keep prices high? There is very little or no cost to rerecord old music as artists usually don't receive royalties on old music.

2. In five years records have climbed from $3.99 to $7.98 suggested retail. If the five monopolies control all distributing and manufacturing, how can the price of records and tapes ever go down?

3. What other industry with the exception of sugar, drugs and meat packing have such high markups at wholesale $.35 to $3.30 for records and [illegible]50 to $4.50 for tapes?

4. What other industry has the F.B.I. policing for them?

In closing, two important facts must stand out and that is the conflict in the circuits. For years most cases in the Second Circuit and Court of Appeals, independent publishers sought to collect money for copyright infringement under the compulsory license provision. (Copies of three cases enclosed.) Why now would these so called "independent publishers" as in the Jondora case be seeking to exclude third parties from the use of the compulsory licensing? The reason is quite clear. The publisher in the Jondora case and the Tame Publishing case are not independents but are divisions of or controlled by C.B.S., R.C.A., E.M.I. and W.E.A. Examples of some of my research in the copyright office are enclosed.

This exclusion of third parties to control competition is a dire violation of the antitrust laws. U.S. v. Singer Manufacturing, 374 U.S. 174. One final note. If the publishers and music companies had the power to exclude people from using their copyrigh why would they attempt to pass anti-piracy state laws? (27 now passed.)

Please contact me if you would like more information in regard t the illegal conspiracy.

Best regards,

[illegible]
David Selman
President

APPENDIX
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	77 CR 323
	)	
DAVID L. HEILMAN	)	

DEFENDANT'S
STIPULATION

IT IS HEREBY STIPULATED by, among and between the UNITED STATES OF AMERICA, through THOMAS P. SULLIVAN, United States Attorney for the Northern District of Illinois, and the defendant, DAVID L. HEILMAN, through his attorney, JAMES I. MARCUS, that:

1. The legislative history of Public Law 92-140 provides as follows:

"Implied Consent to Manufacturer Under Section 1(e)

Like derivative works specified in Section 7 of Title 17, United States Code, sound recordings manufactured in reliance on Section 1(e) would be eligible for copyright, inasmuch as their manufacture in compliance with the compulsory license requirements of Section 1(e) would have the implied consent of the owner of the copyright in the musical work." (October 4, 1971).

2. Between August 28, 1972 and June 8, 1973, defendant received copies of certain letters from Whyte, Hirschboeck, Minahan, Harding and Harlan of Milwaukee, Wisconsin. These letters are attached and are a part of this stipulation.

United States District Judge

APPENDIX
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3. Each of the written copyrighted musical compositions was originally licensed by its copyright proprietor to a recording company, as indicated in the table attached to the Government's Stipulation, for $0.01 to $0.02 for each recording produced and sold at full retail price. These written compositions have also been licensed at identical rates to other independent parties not owned by the recording companies for performance, recording and marketing by those independent parties.

4. The Harry Fox Agency, 110 East 59th, New York, New York, represents certain of the copyright proprietors and publishers listed in the table attached to the Government's Stipulation. On behalf of its client proprietors, the Harry Fox Agency's duties include licensing of copyrighted musical compositions and accepting royalty payments. In the course of its business, the Harry Fox Agency sent letters to defendant in response to certain of the compulsory license fees tendered by the defendant. On various occasions, Harry Fox Agency informed defendant that its client publisher did not wish to issue a compulsory license and did not acknowledge that E-C Tape was entitled to a compulsory license. Tender of compulsory license royalties by E-C Tape was rejected in those instances. In other cases, Harry Fox Agency accepted royalties. These letters comprise Defendant Exhibit No. 1, which is a part of this stipulation.

5. Each of the duplicated recordings produced and sold by E-C Tape was a duplication of a commercially available 45 r.p.m. sound recording which recording was produced prior to February 15, 1972 from the written copyrighted musical compositions listed in the table attached to the Government's Stipulation.

6. The United States Department of Justice took the position until January 20, 1975 that recordings produced prior to February 15, 1972 from copyrighted written musical compositions could be duplicated without violation of federal law provided the compulsory license fee, i.e., $0.02 for each duplication, was tendered to the proprietor of the musical composition copyright. This position was published in a pamphlet in April, 1973 entitled "Copyright Protection of Sound Records". An excerpt from that pamphlet, designated Defendant Exhibit No. 2, is a part of this stipulation.

[redacted]
United States Attorney

[redacted]
Defendant

JOSEPH N. HOSTENY
Assistant United States Attorney

JAMES I. MARCUS, Attorney for
Defendant HEILMAN

THEODORE T. SCUDDER
Assistant United States Attorney

TTS/JNH/sn:gn

Exhibits attached to Defendant's stipulation.

LAW OFFICES

WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND

S. C.
2100 MARINE PLAZA
MILWAUKEE, WISCONSIN 53202
AREA CODE 414
TELEPHONE 271-8210

[redacted]

November 30, 1972

Mr. David Heilman
E-C Tape Service
3695 North 126th Street
Brookfield, Wisconsin 53202

Dear Dave:

In accordance with our conversations, I suggest that the following "indemnity letter" be typed on your stationery and furnished to those radio stations requestion indemnification prior to advertising your products:

Dear _____:

The undersigned has requested you to advertise its products through your facilities and, in consideration for your agreement to so advertise, the undersigned hereby agrees to indemnify and hold you harmless against any and all liability, loss or damage that you may suffer as a result of any claims, demands or judgements against you for any violation of the Federal Copyright Act in connection with advertising such products of the undersigned.

As a condition to such indemnification, however, you agree to immediately notify the undersigned in writing at the undersigned's address as stated above of any claims made against you which are or may be covered under the foregoing paragraph.

Very truly yours,
E-C Tape
By_____

I reviewed the information you supplied to me regarding the National Association of Broadcasters and Recording Industry Association of America, Inc. The case mentioned in the National Association of Broadcasters legal memorandum of June 1971 is Screen Gems-Columbia Music, Inc., et al vs. Mark-Fi Records, Inc. et al

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WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S. C.

 November 30, 1972

reported at 169 USPQ89. This case involved a recovery against an advertising executive for statutory royalties due under Sections 1(e) and 101(e) of the Copyright Act. The case does not apply to E-C Tape since E-C is paying the statutory royalties as required by those sections of the Act. The case does not involve the questions as to damages for unfair competition.

You will note that the above indemnification letter also does not cover damages for unfair competition or other possible violations of state law but is limited to the Federal Copyright Act. Thus, the indemnification letter may not be sufficient for some stations. If it is not sufficient, further consideration should then be given to expanding the indemnification coverage.

You may be interested in a recent holding by the U. S. District Court for the Northern District of Georgia. The case held that record distributors have no standing to bring actions for unfair competition. This right belongs to manufacturers and does not belong to distributors. This case may have some bearing on the Recording Industry Association attempts to force duplicators out of business by harassing litigation. The Georgia case was Gate City Record Service Co. v. Custom Recording Co. decided September 29, 1972.

If you have questions, please call me.

Very truly yours,

Paul A. Pakalski

PAP/th

APPENDIX

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LAW OFFICES

WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S. C.
2100 MARINE PLAZA
MILWAUKEE, WISCONSIN 53202
AREA CODE 414
TELEPHONE 271-3310

August 28, 1972

Mr. David Heilnan
E. C. Tape Service
3695 North 126 Street
Brookfield, Wisconsin 53005

Dear Dave:

Enclosed is a copy of the opinion letter which we are prepared to send, if desired, to Triangle Publications. As you will note, we have concluded that under present interpretation of the Copyright Act, the ads in question will not violate federal copyright law. However, we must acknowledge that the Duchess case reaches a contrary conclusion and, it is primarily for this reason that we have advised you not to indemnify your publishers against expenses incurred in defending a copyright infringement action.

In addition, we did not research the state law of unfair competition, and accordingly, this opinion does not cover that subject matter.

Very truly yours,

Robert V. Abendroth

RVA/dad
Enclosure

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LAW OFFICES
WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S.C.
2100 MARINE PLAZA
MILWAUKEE, WISCONSIN 53202
AREA CODE 414
TELEPHONE 271-8210

August 28, 1972

Mr. Harry C. Coles, Jr.
Triangle Publications, Inc.
250 King of Prussia Road
P.O. Box 750
Radnor, Pennsylvania 19088

COPY

Re: E. C. Tape Service Advertisements

Dear Mr. Coles:

This will confirm our phone conversation August 9, 1972, regarding the reluctance of Triangle Publications to run additional advertisements placed by E. C. Tape Service of the "Beatles" cassettes and tapes in T. V. Guide. At the suggestion of Attorney Gerald P. Boyle, Milwaukee, Wisconsin, counsel for E. C. Tape Service, we were retained by that company to represent it in this matter.

You indicated in our phone conversation, as you did in your letter to Mr. Boyle of July 27, 1972, that Triangle's concern stems from a letter, dated July 17, 1972, from Apple Records demanding that "publication of all ads selling any recordings embodying performances of the Beatles be terminated". Apple Records apparently bases its demand on a claim of ownership of the copyright to the underlying musical compositions. You asked me, as you did Mr. Boyle, to give our thoughts on the merits of Apple Records' claim of copyright infringement. We are pleased to do so although the issue may now be moot since I understand T. V. Guide has agreed to run the ads in question.

It is our opinion, on the facts as represented to us, that these ads by E. C. Tape Service do not violate federal copyright law or the rights of the copyright proprietors thereunder.

We understand the facts are as follows. The performances by the "Beatles", and the recordings thereof which are the subject of the reproductions offered for

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sale by E. C. Tape, all took place prior to February 15, 1972, the effective date of Public Law 92-140 which amended the Copyright Act, 17 U.S.C. §1 et. seq. The manufacturer of these reproductions properly served upon Apple Records, by registered mail on March 2, 1972, with a copy forwarded to the United States Copyright Office, a notice of intention to use the copyrighted compositions pursuant to the compulsory license provisions of the Copyright Act (17 U.S.C. §1(e)), offered to negotiate with Apple Records a mutually satisfactory royalty schedule and, in the absence of any agreement, to pay Apple Records the two cent mandatory royalty for each reproduction made of a copyrighted work. We understand Apple Records did not respond to this offer. The mandatory royalties were placed in an escrow account of the manufacturer and, we understand, are payable at any time to the valid copyright owner upon its demand.

The federal law governing the copyright of sound recordings is Public Law 92-140, which became effective on February 15, 1972, except for a provision which makes criminal sanctions available after October 15, 1971, for nonpayment of the statutory royalty. Prior to the enactment of these amendments to the Copyright Act, sound recordings did not receive copyright protection. This is amply demonstrated by the legislative history to Public Law 92-140. House Report No. 92-487 of the House Judiciary Committee, dated September 23, 1971, stated in part:

> "Existing Federal copyright law (title 17, United States Code) protects the owners of copyright in musical works from unauthorized and uncompensated duplication but there is no Federal protection of sound recordings, as such. ...
>
> "The purpose of [this bill] ... [is to] create a limited copyright in sound recordings, as such, making unlawful the unauthorized reproduction and sale of copyrighted sound recordings.
>
> • • •
>
> "The enactment of [this bill] will mark the first recognition in American copyright law of sound recordings as copyrightable works." 2 U.S. Code Cong. and Ad'tive News (1971), pp. 1567, 1570.

Thus, as the House Report noted, the new legislation was intended to close a loophole in the Copyright Act which permitted and even encouraged reproductions of sound recordings under the compulsory license features of the Copyright Act: "If the unauthorized producers pay the statutory mechanical royalty required by the

Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording". 2 U.S. Code and Ad'tive News (1971), p. 1567.

The new law specifies in Section 3 that the Act does not affect rights to performances recorded prior to February 15, 1972. This Section provides:

> "... nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

The House Report, with reference to this provision, commented:

> "By Committee Amendment... this [copyright] is applicable only to sound recordings fixed, published, and copyrighted on or after the effective date of the legislation and before January 1, 1975." 2 U.S. Code and Ad'tive News (1971), p. 1567.

The Deputy Attorney General of the United States, Richard G. Kleindienst, stated in a letter to the Chairman of the House Judiciary Committee, in response to a request for the views of the Department of Justice on this pending legislation:

> "Copyright protection under the present Copyright Act (17 U.S.C. 1 et. seq.) is extended prospectively to sound recordings. ... The bill does not apply retroactively and Section 3 expressly states that it should not be construed as affecting in any way any rights with respect to sound recordings fixed before the date of enactment. It thus does not deal with recorded performances already in existence". Id. at p. 1578.

Similar views were expressed in letters to the Committee Chairman from the State Department, the Department of Commerce and the Librarian of Congress. Id. at 1574, 1576, 1580.

In summary, it was the unanimous opinion of all governmental agencies commenting on the proposed legislation, as well as the House Judiciary Committee, that sound recordings fixed prior to February 15, 1972, the effective date of the amendment, were not protected by the new legislation. These agencies also

recognized that such recordings were subject, under existing copyright law, to duplication without infringement of copyright.

In his letter, the Deputy Attorney General did note a possible ambiguity in one section of the bill, relating to criminal sanctions for nonpayment of the statutory royalty fee. Mr. Kleindienst commented that although the bill "would not directly grant any copyright protection to existing records", new criminal sanction "would seem to be available" to prevent copying of existing recordings where the statutory royalty was not paid to the holder of the musical copyright. Id. at p. 1578. He then added: "Whether such criminal prosecution is possible depends on the interpretation of the clause in Section 3 of the bill" [quoted above at p. 3] and he suggested that it should be made clear whether the new criminal sanctions were intended to apply to reproduction of records fixed prior to enactment of the bill. This ambiguity, if one exists, in no way affects the present case since, as pointed out above, the statutory royalty has been offered Apple Records as required by the compulsory license features of the Copyright Act and, therefore, criminal sanctions would not in any event be applicable.

There are a number of court decisions also recognizing that a sound recording fixed prior to enactment of P.L. 92-140 may be copied upon payment of the compulsory license fee/ In International Tape Mfrs. Ass'n. v. Gervais, 174 U.S.P.Q. 198 (S.D. Fla. 1972), decided June 12, 1972, the Court confirmed that such sound recordings were not copyrightable and, thus, (at p. 204),3 "The owner of a master disc could not look to the federal copyright laws for protection against the making of copies from a copy of the master disc" and, further (at p. 209), that "the federal law clearly permitted such practices [reproducing sound recordings] prior to the enactment of P.L. 92-140". Analogous judicial comments were made in Capitol Records, Inc. v. Mercury Records Corp., 221 F. 2d 657, 662 (2d Cir. 1955) and Tape Inds. Ass'n of America v. Younger, 316 F. Supp. 340, 345 (D.C. Cal. 1970). Further, Professor Nimmer, a recognized scholar on copyright law, in discussing the status of the law prior to October 15, 1971, said:

> "Assuming such [an unauthorized reproducer] duly serves a notice of intent to use, and pays the compulsory license royalties, the somewhat astounding result is that he is not an infringer under the Copyright Act. ... All of the other elements [except the copyright in the musical composition itself] contained in the original record which he has without authority duplicated are not copyrightable, and hence his use of such

WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S. C.

Mr. Harry C. Colea, Jr.
Page 5
August 28, 1972

elements does not give rise to an action for copyright infringement." Nimmer on Copyright, 430-31 (1970).

We are aware of one decision which holds that the compulsory license provisiong of the Copyright Act is not available to an unauthorized record copier. Duchess Music Corp. v. Rosner, 173 USPQ 278 (9th Cir. 1972), notice of appeal filed 5/16/72 (U.S. Supreme Court, Docket No. 71-1581). This case contained a strong dissent and has been severely criticized elsewhere. It distinguishes between the unauthorized duplication and making "similar use" of a sound recording, holding, in effect, that only the latter is subject to compulsory license under the Copyright Act.

In the Gerstein case, the Court, referring to the Duchess decision, stated:

> **"This interpretation of the compulsory license provision is based on the misconception that because underlying musical composition is copyrighted, the unauthorized reproduction of the performance embodied in the sound recording of that composition is, and ought to be, prohibited by the federal copyright laws. If the law were as the Court stated, then [unauthorized recorders] could not exist. In fact, the law is not what the Court stated". (at p. 208).**

The Duchess case is against the weight of authority and in light of the legislative history to the recent amendments to the Copyright Act, does not, we believe, represent a correct interpretation of the Act.

If you have any questions regarding this letter, please do not hesitate to contact us.

Very truly yours,

Robert V. Abendroth

RVA/dad

cc: Gerald P. Boyle

LAW OFFICES
WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S. C.
2100 MARINE PLAZA
MILWAUKEE, WISCONSIN 53202
AREA CODE 414
TELEPHONE 271-3210

June 8, 1973

Mr. J. N. Cole
Director of Editorial Services
Teen Magazine
7833 Sunset Blvd.
Los Angeles, Calif. 90046

Dear Mr. Cole:

Ed Strauss of E-C Tape Service has asked us to reply to your April 24, 1973 letter. We will attempt in this letter to convey to you our understanding of the copyright law of the United States and its effect on tape recordings such as those sold by our client.

The Copyright Act was amended, effective February 15, 1972, to prohibit the mechanical reproduction of recordings which were first fixed after that date. In other words, a tape including the hit songs of 1973 would be prohibited by the new Copyright Act unless the producer of the tape has obtained licenses from the copyright proprietors. However, our client's tapes only include songs which were fixed prior to February 15, 1972, and those songs are being reproduced under the compulsory license provision of the Act as it existed prior to that time.

According to the Copyright Act, once a Copyright proprietor licenses anyone to mechanically fix a protected song on a tape or disc recording, anyone else may avail himself of the compulsory license rights of Sections 1 and 101 of the Copyright Act, by providing the copyright proprietor with a notice of intent to use the song and the monthly payment of specified royalties. E-C Tape has assured us that they have fully complied with these requirements of the Copyright Act. Therefore, we presently feel that E-C Tape is not violating the Federal Copyright Act.

WHYTE, HIRSCHBOECK, MINAHAN, HARDING & HARLAND
S.C.

Much litigation on this issue has developed among record companies and tape duplicators in the past few years. A number of courts have held that a duplicator may avail himself of the compulsory license rights and produce tapes without violating the Federal Copyright Act. An example of such a decision is that of the Federal District Court for the District of New Jersey in Jondora Music Publishing Company v. Melody Recordings Inc., 351 F. Supp. 572 (1972). That court ruled that music publishers who were paid the compulsory license royalties specified in the Federal Copyright Act had no standing to sue record duplicators since they were receiving the compensation provided for by Congress. There is a contrary opinion in the recent case of Duchess Music Company v. Stern, 458 F. 2d. 1305 (9th Cir.). We feel, however, as do our clients, that the cases which have held that a music publisher may not sue a duplicator who has fully complied with the compulsory license provisions are better founded in case law and the legislative history of the Copyright Act. For this reason, E-C Tape Service continues to manufacture its tape collections of hit recordings.

The record companies of the United States have publicly stated that their goal is to prohibit companies such as E-C from continuing the manufacture of such tapes. To date, such efforts have been successful in a few cases and a total failure in others. We believe that the complaints you have received from the record companies are a part of this effort. Should it be ultimately determined that the duplication of hit tapes is a violation of the Copyright Act, E-C Tape Service has assured us that they will cease production of such tapes, but that while their position is being supported by numberous federal court decisions, they will continue to natinally advertise and sell their tapes. If we may be of further help to you, or if you have any additional questions, please feel free to write us.

Very truly yours,

John C. Cooper III

JCC:laf

cc: Ed Strauss
Dave Heilman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	77 CR 323
	)	
DAVID L. HEILMAN	)	

GOVERNMENT'S STIPULATION

IT IS HEREBY STIPULATED by, among and between the UNITED STATES OF AMERICA, through THOMAS P. SULLIVAN, United States Attorney for the Northern District of Illinois, and the defendant, DAVID L. HEILMAN, through his attorney, JAMES I. MARCUS, that:

1. Defendant DAVID L. HEILMAN (hereinafter defendant or defendant HEILMAN) was doing business between in or about 1971 and in or about February, 1976 as E-C Tape, Incorporated, also known as E-C Tape Service (hereinafter E-C Tape), a division of Economic Consultants, Incorporated, located at Lake Villa, Illinois and Brookfield, Wisconsin, which business defendant did own, operate and control.

2. Throughout the period of time mentioned in paragraph 1, E-C Tape engaged in the business for profit of duplicating sound recordings, i.e., making mechanical reproductions of written musical compositions previously created, copyrighted and then recorded by others. The mechanical reproductions sold by E-C Tape were in the form of phonograph records, eight-track magnetic tape cartridges, magnetic tape cassettes and reel-to-reel magnetic tapes (hereinafter duplicated records and tapes or duplicated recordings).

3. The written musical compositions were duly registered in the United States Copyright Office under the specified registration numbers in Class E pursuant to the provisions of Title 17, United States Code (1909), all published copies of which bore the requisite notice of copyright. Each written musical composition had been previously recorded pursuant to license by a recording company (not E-C Tape) which provided performing artists and recording facilities. The written musical compositions, the copyright proprietors thereof, performing artists, recording companies, copyright registration numbers, and date of sale by the defendant are listed in the attached table, a part of this stipulation. Copyright certificates are Government Group Exhibit No. 1, a part of this stipulation.

4. Referring to the attached table, defendant produced each of the duplicated recordings sold by E-C Tape by (a) purchasing a single copy of a commercially available sound recording (generally a 45 r.p.m. record) of each of the musical compositions listed in the attached table, which commercial recordings had been produced by the named recording company and performing artist pursuant to licenses issued by the copyright proprietors also listed in the table; (b) duplicating the single copy of the purchased recording many times and compiling it with other duplicated recordings; (c) tendering the statutory compulsory license fee on the 20th of each month to the musical composition copyright proprietor, i.e., $2.02 for each composition embodied in each duplicated recording manufactured during the preceding month; and (d) selling compilations of the duplicated

Ex

[illegible] to distributors on mail order as sent by those customers in [illegible] E-C Tape [illegible] in Playboy, Penthouse, Hot, Gallery, [illegible] and out of copyright and duly renewed versions. Names of the recording companies and musical composition copyright proprietors, and copyright notices thereof, were omitted from duplicated recordings and packaging and labelling materials produced by E-C Tape. Each of E-C Tape's duplicated tapes sold for $6.98 retail and each duplicated record sold for $5.98 retail. Names of original artists appeared by the title of each composition included in a duplicated recording. However, E-C Tape's name, address and notice of its compilation copyright was displayed on each tape or record.

5. At no time did E-C Tape disclose to any of its customers that (a) the duplicated recordings had been duplicated from commercially available copies of sound recordings, rather than from original master recordings; (b) the written musical compositions rendered in its duplicated recordings were copyrighted by parties other than E-C Tape; (c) E-C Tape was not authorized by written musical composition copyright proprietors or sound recording owners to sell duplicated recordings; and (d) legal decisions described in paragraphs 7 and 8.

6. None of the duplicated recordings sold by E-C Tape resulted from any arrangement and production of a new recording from a copyrighted written musical composition, i.e., E-C Tape hired no performing artists or recording facilities to produce an original

recording. E-C Tape's original activities were limited solely to duplicating existing recordings of musical compositions and placing them in new sequences in its own compilations, and in some cases to certain electronic enhancements, i.e., suppression of background noise and conversion from monaural to simulated stereophonic recordings. In all cases, the cost of performing artists (composers, arrangers, musicians and singers) was paid solely by the recording company which originally produced, pursuant to license, the recording commercially purchased and duplicated by E-C Tape. At no time did E-C Tape offer to reimburse part or all of the cost of producing any of the recordings E-C Tape used beyond (a) the retail purchase price of the single copy of a recording E-C Tape later duplicated many times and (b) the statutory license fee, which was accepted by 2 composition copyright proprietors. At no time did E-C Tape seek or obtain the authorization of each of the respective musical composition copyright proprietors or recording companies to engage in its business as described in this stipulation.

7. On January 20, 1975, the United States Department of Justice, based on Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied sub nom. Rosner v. Duchess Music Corp., 409 U.S. 847 (1972), Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), aff'd on rehearing en banc, cert. denied sub nom. Colorado Magnetics, Inc. v. Edward B. Marks Music Corp., 419 U.S. 1120 (1975), and Jondora Music Publishing Co. v. Melody Recordings, Inc., 506 F.2d 392 (5th Cir. 1974), announced publicly in

writing that henceforth persons selling duplicated recordings of recordings produced prior to February 15, 1972 from copyrighted written musical compositions would be prosecuted for criminal copyright infringement. That announcement was reported in trade journals and the news media generally and is a part of this stipulation as Government Exhibit No. 2. Defendant was aware of this announcement, filed the suit described in paragraph 8(c) below to enjoin prosecution, and continued his business as described herein.

8. Between December, 1972 and December, 1975, defendant was a party to, or initiated, several legal proceedings all of which concerned the legality of the business conducted by E-C Tape under federal copyright statutes or state common law copyright and unfair competition theories. The findings of fact of each of those proceedings are a part of this stipulation. Those proceedings, and the results thereof, were:

a) Mercury Record Pro., Inc. v. Economic Consult., Inc., 64 Wis. 2d 163, 218 N.W. 2d 705 (June 17, 1974) wherein the court held that defendant Heilman's record duplicating activities appropriated unfairly the property interest of the recording companies, i.e., their investment in artists' contracts, recording studios, advertising, etc. Copies of the unpublished trial opinions (original and on remand) are attached as Defendant Exhibit No. 3 and Government Exhibit No. 3.

b) A & M Records, Inc. v. [illegible], 75 Cal. App. 3d 554, 142 Cal. Rptr. 560 (1977) wherein the court affirmed (1) the award of [illegible] and (2) the injunction [illegible] recordings in California with respect to A & M Records, Inc. The award and injunction were granted by the Superior Court of Los Angeles County on December 19, 1975.

c) Heilman v. Levi, 391 F.Supp. 1106 (E.D. Wisc. 1975) wherein Judge Reynolds held that persons wilfully duplicating commercially available sound recordings for profit, which sound recordings were produced before February 15, 1972 from written copyrighted musical compositions, were liable to criminal prosecution and denied defendant Heilman's motion for an injunction against prosecution. This suit was filed by defendant immediately after the Justice Department's announcement of January 20, 1975, and defendant Heilman's letter to Assistant Attorney General Henry Petersen of January 15, 1975. This letter is Government Exhibit No. 4, a part of this stipulation. Defendant Heilman had notice of Judge Reynolds' decision by April 30, 1975. The decision was affirmed on September 8, 1978, at 583 F.2d 373 (7th Cir. 1978).

d) E-C Tapes, Inc. v. Kelly, et al., 412 F.Supp. 245 (N.D. Ill. 1975) wherein Judge Lynch denied defendant Heilman's motions for a preliminary injunction and a return of seized property and held (1) that defendant had no compulsory licenses to duplicate recordings [illegible] this stipulation, (2) defendant had received more than

a [illegible] of protest from recording companies as early as 1973, (3) had twice violated a California injunction against shutting his products into that state, and (4) defendant had been aware since 1973 of federal court decisions that the compulsory license provision is not available to duplicators of recordings. A transcript of the hearing in that case is attached as Government Exhibit No. 5.

9. On May 16, 1975, pursuant to a search warrant issued by United States Magistrate James T. Haley, the Lake Villa, Illinois business premises of E-C Tape were searched by special agents of the Federal Bureau of Investigation, including Special Agent James S. Dorger. Found on the premises were the following:

a) Approximately 20,000 duplicated tapes and records, including, but not limited to, Government Group Exhibit No. 6, which is a part of this stipulation.

b) Business records, including files of order placement and shipment; billing of customers and correspondence therewith; customers' complaints and correspondence with musical composition copyright proprietors, but not limited to, Government Group Exhibit No. 7, a part of this stipulation.

c) Photographs of the Lake Villa premises used by E-C Tape, taken at the execution of the search warrant, are attached hereto and form a part of this stipulation as Government Group Exhibit No. 8.

10. E-C Tape continued to fill orders by mail until at least January of 1976.

THOMAS P. SULLIVAN
United States Attorney

DAVID L. HEILMAN, Defendant

JOSEPH N. HOSTENY
Assistant United States Attorney

JAMES I. MARCUS, Attorney for Defendant HEILMAN

THEODORE L. SCUDDER
Assistant United States Attorney

JHHostesy/ITTsuiderian
353-5352/353-5360

Count	Written Composition	Composition Copyright	Performing Artist	Company	[illegible]	[illegible]
1	My Girl	Jobete Music Co. (owned by Motown)	The Temptations	Motown	EU (None) EP1845315	April 29, 1975
4	My Prayer	World Wide Music Co., Ltd.	The Platters	Phonogram	EU (None) EP0631068 K387501	May 6, 1975
7	Come Go With Me	Gil Music Corp.	Del-Vikings	ABC	EU462690 EP107838	May 6, 1975
9	The Stripper	David Rose Pub. Co.	David Rose	MGM	EU717934 EP164779	May 8, 1975
11	Lodi	Jondora Music Co. (owned by Fantasy)	Creedence Clear Water Revival	Fantasy	EU110912 EP260525	May 8, 1975
12	Question	Tyler Music Ltd.	Moody Blues	London	EU (None) EP0142318	May 8, 1975
13	Handyman	Travis Music Co. (owned by United Artists)	Jimmy Jones	United Artists	EU593307 EP139395	May 12, 1975
14	Mack The Knife	Warner Bros. (owned by WEA)	Bobby Darin	WEA	D27412 EU (None) EP94648 K159639	May 12, 1975

Count	Written Composition	Composition Copyright	Performing Artist	Company	Renewal	Date
15	Only You (and You Alone)	Hollis Music Co.	The Platters	Phonogram	EU395970 EP93382	May 12, 1975
16	April Love	Leo Feist, Inc. (owned by United Artists)	Pat Boone	ABC	EU481730 EP113227	May 12, 1975
17	So Rare	Robbins Music Corp. (owned by United Artists)	Jimmy Dorsey	Fantasy	EU137914 EP62655 R340122	May 12, 1975
19	Friendly Persuasion (Thee I Love)	Leo Feist, Inc. (owned by United Artists)	Pat Boone	ABC	EU434835 EP101696	July or August 1975
21	Love Is A Many Splendored Thing	Miller Music Corp. (owned by United Artists)	The Four Aces	MCA	EU39006 EP89346	January 7, 1976
22	Tom Dooley	Ludlow Music, Inc.	The Kingston Trio	Capitol	EU546470 EP124157 R596833 (1946 version)	January 7, 1976
23	Stagger Lee	Travis Music Co. (owned by United Artists)	Lloyd Price	ABC	EU548974 EP126741	January 7, 1976

Count	Written Composition	Composition Copyright	Performing Artist	Company	Renewal	Date
24	Cathy's Clown	Acuff-Rose Pub.	Everly Bros.	Warner Bros.	EU (None) EP139961	January 7, 1976
25	The Exodus Song	Carlile-Alpena S.A. (owned by Polygram)	Ferrante & Teicher	United Artists	EU653149 EP148525	January 7, 1976
26	An Old Fashioned Love Song	Almo Music Corp.	Three Dog Night	A&M	EU224401 EP293161	January 7, 1976

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	77CR323
	)	
DAVID HEILMAN,	)	
	)	
Defendant.	)	

EXCERPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the HONORABLE JOHN F. GRADY, one of the Judges of said Court, in his courtroom in the United States Court, Chicago, Illinois, on Wednesday, February 7, 1979, at 9:00 p.m.

PRESENT:

THE HONORABLE THOMAS P. SULLIVAN
United States Attorney
(219 South Dearborn, 15th Floor
Chicago, Illinois 60604) by
MR. JOSEPH HOSTENY
Assistanted United States Attorney

appeared on behalf of the Government:

MR. JAMES I. MARCUS
(55 East Monroe Street, Room 4335
Chicago, Illinois 60603)

appeared on behalf of the defendant.

* * *

(There preceded arguments of counsel, which were reported stenographically but are not herein transcribed, which were thereafter followed by the Judge's ruling, to whit:)

THE COURT: I don't need them. I'll give you my decision now.

Prior to the Duchess decision in 1972 and probably for some period of time after 1972, I think that one could reasonably have taken the position that the duplication of sound recordings in the manner that was done here was not a copyright infringement.

That position became progressively less tenable as additional cases were decided; and by January 31, 1975, when the Thane case had been decided, four circuits had ruled that the kind of conduct engaged in by the defendant in this case did constitute a copyright infringement.

I've read those cases. Their rationale seems eminently sensible to me. It seems to me that a contrary interpretation of the words "similar use" results in a frustration of the purpose of the copyright statute.

I don't propose here to engage in any of the invidious descriptions of this conduct that were used by the authors of some

of those appellate opinions, because as I see it, the issue here isn't whether the defendant did something that was immoral or something that amounted to larceny; the issue is whether he did anything that constituted a copyright infringement and whether he did that wilfully.

By the time Count I of the indictment occurred, that is, the offense in Count I of the indictment occurred, there had been added to the Fourth Court of Appeals' decisions the decision of Judge Reynolds in the case that was recently affirmed by the Seventh Circuit. In September of 1975, Judge Lynch of this court held against the defendant.

By the time all of the occurrences alleged in the indictment had occurred, I find that the defendant knew that there was a very strong likelihood that the conduct in which he was engaged would be held by whatever forum might have venue to constitut a violation of the criminal statute.

Now, it is true that no one could have said that with absolute certainty; and yet it seems to me that criminal sanctions must exist in an absence of certainty, otherwise behavior that is detrimental to society and clearly intended by the Congress to be proscribed can be engaged in with impunity.

People go to lawyers for advice; what lawyers give are legal opinions. This has been true since the dawn of time. Law is a constantly changing thing. And every intelligent member of society knows that when he commits an act which may constitute

a violation of statute that he is treading upon very dangerous ground.

There is absolutely nothing unfair in this prosecution. This is not a defendant who was prosecuted out of the blue and who had no notice that he would be prosecuted if he persisted in his conduct; rather, it is the case of a defendant who insisted upon telling the prosecuting authorities that they were wrong. He knew he was going to be prosecuted and he defied the prosecuting authorities.

Now, he had the right to do that, in the sense of a constitutional right to speak his mind or to have his opinion. But he must also bear the burden of being wrong when he chooses to gamble.

And that's precisely what he did here. He knowingly and intentionally and intelligently chose to gable.

Now, what did he choose to gamble on? The inference that I draw from this evidence and from the totality of the circumstances is not that the defendant was gambling on the law turning out to be other than what these four circuit courts of appeal said it was; rather, what he was gambling on was that the prosecution would not be able to prove that he was wilful, due to the difference of opinio which had been expressed by some of the persons who had discussed this subject, including, of course, the dissenting judges in these Court of Appeals cases.

I believe that the defendant went to these two lawyers,

Mr. Kells and Mr. Sosney, not for the purpose of obtaining legitimate legal advice as to what his actual prospects were; rather, he went to them as part of an elaborate orchestration of his no wilfulness defense.

If they discussed anything at all about this case--and I have my doubts that they did--I believe the discussion was in terms of whether or not the law was sufficently confused that Mr. Heilman could not be found beyond a reasonable doubt to have wilfully violated it.

I listened carefully to the testimony of these two attorneys, and their legal knowledge about the subject matter of this case did not impress me; in fact, I was unfavorably impressed with their expertise and with their testimony about the alleged conversations they had with Mr. Heilman.

Mr. Kells' attempt to distinguish the Court of Appeals decisions on the basis that they were civil cases was unconvincing, to say the least. And I strongly suspect that that is a distinction that was suggested to him by Mr. Heilman rather than vice-versa.

The point is made that if the defendant intended to violate the statute he would not have complied with so many of its provisions. He would not have paid the license fee; he would not have sent them notice; he would not have operated in the open. But to say that is to overlook the very essence of the scheme here.

The scheme was to do precisely that: to give the appearance of legitimacy, the appearance of good faith; to tender the license fee so that he couldn't be charged with a wilful violatio

of the statute.

It wasn't really very much trouble for him to do this. Two cents a record is a meaningless pittance considering the profit that he was making, which was enormous.

A point was made that Mr. Heilman wasn't selling these records at a cut rate, but rather was charging full price, and this shows that he was legitimate.

In my mind, to the extent that we're talking about a fraud here, it seems to me that charging the full price aggravates the situtation rather than ameliorates it. His greed was much greater than that of the pirates who charged something that bore some remote relationship to their actual cost.

No one could possibly have told Mr. Heilman that he was safe in going ahead and doing what he did. No one could possibly have told Mr. Heilman that his orders were anything like even of not being prosecuted and convicted. And I don't believe that anyone did make either of those statements to Mr. Heilman.

But more than that, the person who knew most about the orders and most about the dangers that lay ahead was Mr. Heilman, himself. And had anyone given him any such assurances, I'm sure that he would have known better than to rely upon them.

I find, on the basis of all the circumstances, that the defendant did wilfully and for profit violate the statute on each of the occasions mentioned in the copyright counts of the indictment and I find him guilty beyond a reasonable doubt on each of those

counts.

My interpretation of wilfulness, based upon the cases cited by the Government and my own common-sense reaction to the matter, is that one acts wilfully when he intentionally commits an act which he knows has a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute. This is what happened here.

Now, which counts are those, Mr. Hosteny?

MR. HOSTENY: Your Honor, the counts included in the stipulation--I'll read those now--are: I, IV, VII, IX, XI, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXII, XXIII, XXIV, XXV, and XXVI.

THE COURT: Those are the copyright counts?

MR. HOSTENY: Yes, your Honor.

THE COURT: All right.

MR. HOSTENY: Omitting those that we thought we would not be able to establish.

THE COURT: Those are the counts on which I find the defendant guilty.

And you're moving to dismiss the remaining counts?

MR. HOSTENY: Yes, your Honor.

THE COURT: What are the numbers, for the clerk?

MR. HOSTENY: For the record, those counts would be: Count I, II, III, V, VI, VIII, X, XVIII, XX. And that's it, your Honor. The mail fraud counts were dismissed previously.

THE COURT: All right, those counts will be dismissed.

MR. HOSTENY: Thank you, your Honor.

THE COURT: The cause will be referred to the Probation Office for a presentence investigation.

Disposition.

THE CLERK: March 14th at 2:00 p.m.

THE COURT: All right.

Let me say to counsel that I appreciate the fine job of presenting the matter that each of you did, and I especially appreciate the work that you did in advance of trial to reduce the amount of time we had to spend.

MR. HOSTENY: So do we, Judge.

THE COURT: Yes. Well, I'm sure that you had to spend the time, but it saved me a lot, and I certainly appreciate that.

MR. HOSTENY: Judge, I'm going to be out of town on the 14th, and I'm probably the only person down there.

THE COURT: We'll give you another date.

MR. HOSTENY: Would one week later be possible?

THE CLERK: March 21?

MR. HOSTENY: Yes.

THE CLERK: 2:00 p.m.

MR. HOSTENY: Thank you, Judge.

THE COURT: I'll give counsel back their exhibits here.

(Which were all the proceedings had further in the cause herein on the day and date aforesaid.)

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	77CR323
	)	
DAVID HEILMAN,	)	
	)	
Defendant.	)	

CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled cause before the HONORABLE JOHN F. GRADY, one of the Judges of said Court, on February 7, 1979, were reported in shorthand and later transcribed into typewriting under my direct personal supervision; and that the foregoing pages, numbered 1 through 8, are a true, correct and complete transcript of the official shorthand notes so made as aforesaid.

Claude W. Youker, Jr.
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1301

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID L. HEILMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-Cr-323-01—**John F. Grady**, *Judge*.

ARGUED NOVEMBER 28, 1979—DECIDED FEBRUARY 8, 1980

Before CUMMINGS, *Circuit Judge*, WISDOM, *Senior Circuit Judge*,* and CUDAHY, *Circuit Judge*.

CUMMINGS, *Circuit Judge*. This appeal challenges the validity of the first criminal prosecution for "record piracy" under Section 104 of the Copyright Act (17 U.S.C. § 104). The indictment also contained numerous mail fraud counts (18 U.S.C. § 1341). After a bench trial, defendant was found guilty of 18 of the 26 counts of the copyright offenses; the remaining counts of the indictment were dismissed. Defendant was sentenced to six months' imprisonment and fined $500 on each count,

* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

the prison terms to run concurrently and the fines to be accumulated. From the judgment of conviction, the defendant appeals. We affirm.

I. *Factual Background*

The facts of this case, set forth in affidavits of defendant and stipulations of the Government and the defendant, are not in dispute. Defendant was the president of E-C Tape Service, Inc. until April 1976. E-C Tape was engaged in the business of producing and marketing anthologies of recorded music at Lake Villa, Illinois, and Brookfield, Wisconsin. To make these records and tapes, the defendant used only copyrighted music that was recorded or "fixed" by others prior to February 15, 1972. Records fixed after that date are not involved in this case. The defendant duplicated commercially available records (usually 45 r.p.m.'s), organized them into anthologies, and sold them by mail order. Two out of sixteen of the holders of copyrights in the duplicated compositions accepted the defendant's tender of a two cent "compulsory license fee" mandated by 17 U.S.C. § 1(e).[1]

[1] A complete revision of the federal copyright law was enacted on October 19, 1976, to become effective January 1, 1978. The crimes charged in the present case were committed under the former law. All citations unless otherwise noted are to the law effective prior to January 1, 1978.

At the time of the crimes charged in the indictment the relevant portion of Section 1(e) read:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * * * *
>
> (e) to perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, that * * * as a condition of extending the copyrighted control to such mechanical reproductions, that whenever the owner of a musical

(Footnote continued on following page)

In October 1971, Congress amended the copyright law, effective February 15, 1972, and created a copyright interest in sound recordings. 17 U.S.C. § 1(f).[2] Congress also promulgated criminal sanctions for unauthorized duplication of copyrighted sound recordings fixed after February 15, 1972.[3]

[1] *continued*

> copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make *similar use* of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof * * * (Emphasis supplied).

[2] Prior to this revision in the law the only federal copyright protection extended to musical compositions was limited by the concept of compulsory licensing which compelled a copyright owner to license the use of the copyrighted musical composition to anyone after the copyright owner "used or permitted or knowingly acquiesced in the use" of the copyrighted work in the manufacture of a sound recording. A licensee in turn was required to pay the copyright owner the royalty of 2 cents per use. The payment of the royalty protected the licensee from further liability to the copyright owner except in the case of "public performance for profit." 17 U.S.C. § 1(e).

[3] 17 U.S.C. § 104 read:

> § 104. *Willful infringement for profit*
>
> (a) Except as provided in subsection (b), any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court: Provided, however, that nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

(Footnote continued on following page)

The United States Department of Justice took the position that record duplicators who copied recordings made prior to February 15, 1972, would not violate the copyright laws so long as they paid the compulsory license fee. "Copyright Protection of Sound Recordings" (App. 103-104). On January 20, 1975, however, the Department of Justice changed its position and publicly announced a prospective policy to prosecute criminally for copyright infringement those persons who duplicated records fixed prior to February 15, 1972, regardless of payment of the licensing fee.[4] Subsequently, on September 3, 1976. Congress once again amended the scope of 17 U.S.C. § 1(e) to provide that the compulsory license provided for copyrighted musical works would not be available to persons making unauthorized duplications of sound recordings. Section 115(a) of Pub. L. 94-553 (effective October 19, 1976), 90 Stat. 2561 reproduced in U.S. Code Cong. and Admin. News (94th Cong. 2d Sess. 1976).

After the Department of Justice announced its prospective policy change, Heilman (the defendant herein) filed a suit in the United States District Court for the Eastern District of Wisconsin for declaratory judgment

[3] *continued*

Section 101(e) added in 1971 provides that the unauthorized manufacture or sale of a record or tape of a copyrighted musical work constitutes an infringement of the copyright. This provision made the criminal sanctions of Section 104 applicable to those who without authorization manufacture or sell copyrighted discs or tapes fixed after February 15, 1972. See 1 U.S. Code Cong. and Admin. News (92nd Cong. 1st Sess. 1971) 418-419.

[4] The new Department of Justice policy was based on recent decisions by four Circuit Courts of Appeals which held in civil cases that record duplication did constitute copyright infringement. See *Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir. 1975); *Jonders Music Publishing Co., Inc. v. Melody Recordings, Inc.*, 506 F.2d 392 (3rd Cir. 1974), certiorari denied, 421 U.S. 1021; *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974) (*en banc*), certiorari denied, 419 U.S. 1120; *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972), certiorari denied *sub nom. Rosner v. Duchess Music Corp.*, 409 U.S. 847.

that his record duplication business did not violate the Copyright Act. He also sought an injunction against any criminal prosecution of him under that Act. On April 28, 1975, Judge Reynolds denied a motion for a temporary restraining order or preliminary injunction. On July 14, 1977, he entered summary judgment against defendant. *Heilman v. Levi*, 391 F.Supp. 1106 (E.D.Wis. 1975). This Court affirmed. *Heilman v. Bell*, 583 F.2d 373 (7th Cir. 1978), certiorari denied, 440 U.S. 959.

On March 31, 1977, almost two years after the entry of Judge Reynolds' ruling on the preliminary injunction, this criminal indictment was filed in Illinois alleging that defendant between April 29, 1975, and January 7, 1976, had duplicated and sold certain recordings that had been fixed prior to February 15, 1972, such as "Mack the Knife," without authorization from the copyright owners. The indictment also alleged that mail frauds were committed in connection with the defendant's sales of these records and tapes. The evidence at trial consisted of the Government's stipulation with exhibits, the defendant's stipulation with exhibits, and the testimony of two defense witnesses (Jan. 30, 1979, Tr.). The two witnesses, both counsel who had been consulted by defendant regarding the legality of his record duplication business, testified that they had advised the defendant in 1975 and 1976 that his activities would not violate the criminal provision of the Copyright Act so long as he continued to tender the compulsory license fee and to give notice to the copyright owner (Jan. 30, 1979, Tr. 3-9, 23-26).

Defendant raises these issues on appeal: (1) Are the provisions of the Copyright Act which authorize criminal sanction unconstitutionally vague? (2) Did the defendant willfully infringe copyrights when he was duplicating records but was also complying with the compulsory license provisions of the Copyright Act? and (3) Did the district judge deny defendant equal protection of the laws when he refused to hold a hearing on whether this was an impermissibly selective prosecution?

II. *Vagueness of Section 104 of the Copyright Act*

Under Section 104 of the Copyright Act "any person who willfully and for profit shall infringe any copyright secured by this title" is guilty of a misdemeanor (note 3 *supra*). Section 101(e) defines infringement of a copyright as including the unauthorized manufacture or sale of a record or tape (*idem*). Section 101(e) also specifies that the copyright in a musical composition extends to a record or tape of a performance of the written composition, but Section 1(e) provides that once the copyright holder allows a record or tape to be made, anyone may make "similar use" of the composition upon payment of a compulsory license fee (note 1, *supra*). In sum, a person who makes or sells a record or tape of a copyrighted musical composition without authorization infringes unless the "similar use" exception of Section 1(e) applies.

Defendant claims that the Copyright Act is unconstitutionally vague because it is ambiguous whether his duplication of records fixed prior to February 15, 1972[5] falls within the "similar use" exception to liability for infringement. On the other hand, the Government contends that this argument of vagueness must fail because unlike the vagrancy ordinance struck down for lack of notice in *Papachristou v. City of Jacksonville*, 405 U.S 156, here defendant received notice of the Department of Justice's prospective policy to prosecute record and tape duplicators on the ground that the "similar use" provision did not protect their activities. We agree.

At the time the defendant committed the offenses charged in the indictment, that is, from April 29, 1975, through January 7, 1976, four circuit courts of appeals and a district court had ruled that record duplicators could not avail themselves of the "similar use" provision of Section 1(e) to avoid a judgment for copyright infringement because "similar use" does not include

[5] As noted above, sound recordings "fixed" after February 15, 1972, are themselves subject to copyright under 17 U.S.C. § 1(f) and are not part of the present controversy which concerns only pre-February 15, 1972, sound recordings.

duplication of original recordings.[6] Public notice was given to the defendant through the trade press. Gov't Ex. 2. Further, the Department of Justice's decision to prosecute was made prospective only (App. 140). That Congress chose in 1976 to clarify its intent with respect to the "similar use" provision does not establish defendant's claim of unconstitutional vagueness nor does it negate the implication that the judicial gloss on Section 1(e) had already provided clear notice of the activity which is forbidden. *Grayned v. City of Rockford*, 408 U.S. 104, 109, 111-112. This Court rejected a similar argument with respect to the 1971 amendments in *Heilman v. Bell*, 583 F.2d 373, 376-377, 378 (1978), certiorari denied, 440 U.S. 959. Indeed in that case we also held that "criminal charges under 17 U.S.C. §§ 101(e) and 104 may [as here] be brought against tape duplicators who have attempted to comply with § 1(e)." 583 F.2d at 377.

III. *Willful Infringement*

The defendant contends that even if he infringed copyrights in musical compositions, his conviction should be reversed because he was not guilty of a willful violation of the Copyright Act within the meaning of Section 104 (note 3 *supra*). Defendant twice consulted with counsel regarding the legality of his duplication business, once in 1971 shortly after going into business (App. 101-102),

[6] See cases cited in note 4, *supra*; to the same effect see *Heilman v. Levi*, 391 F.Supp. 1106 (E.D. Wis. 1975). Defendant contends that we cannot carry the disposition reached in these five civil cases into the criminal setting of the present case. At oral argument counsel for defendant conceded that except for the requirement of a finding of specific intent the issues in the present case were the same as those in the civil cases but urged that the rules of statutory construction applicable in a criminal case were more restrictive. No reason has been advanced, however, which would justify this Court's re-evaluating the holdings of the four courts of appeals or of the decision of this Court in *Heilman v. Bell*, *supra*, that the compulsory license provision of the Copyright Act cannot be used by record and tape duplicators to avoid an infringement action.

and again following the 1971 amendments to the Copyright Act (App. 102, 127-136). Defendant continued to remit the statutory licensing fee during the times covered by the indictment. Given these good faith efforts to comply with the law, defendant urges that there is insufficient evidence that he willfully violated the Act.

The Supreme Court in *Screws v. United States*, 325 U.S. 91, established a two-part test for willfulness: First, the judge must determine that the right at issue is clearly defined. 325 U.S. at 100. Second, the jury must determine that the defendant acted with the purpose of depriving the victim of the interest protected by that right. 325 U.S. at 103. The purposiveness of defendant's acts necessary to meet the willfulness standard was also described in *United States v. Murdock*, 290 U.S. 389, 394-395, where the Supreme Court further defined "willful".

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, perversely * * * The word is also employed to characterize a thing done without ground for believing it is lawful * * * or conduct marked by careless disregard of whether or not one has the right so to act. (Citations omitted).

In determining whether defendant willfully infringed copyrights by continuing his music duplication business from April 29, 1975, through January 7, 1976, the period covered by the indictment, it is relevant to examine the critical facts known by the defendant. First of all he knew that the musical compositions which he duplicated were copyrighted. He knew that in January 1975 the Department of Justice had announced a prospective policy to prosecute persons who had made and sold pre-February 15, 1972, duplications. He knew that four Circuit Courts of Appeals had ruled in civil cases that such record duplications constituted copyright

infringement.[7] Judge Reynolds had refused to grant him a preliminary injunction because the judge considered the Copyright Act to forbid defendant's record duplication activities.[8] Finally, defendant knew that his conduct had been ruled illegal under the laws of New York, California, and Wisconsin.[9]

Under these circumstances it was entirely appropriate for the district court to conclude that defendant had willfully infringed copyrights. With each additional case that was decided, defendant's position that his business did not implicate a copyright violation became less and less tenable. Instead of conforming his conduct to the bounds of the law, defendant chose to persist in conduct which he knew had "a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute" (Feb. 7, 1979, Tr. 7). That is surely sufficient to meet the accepted definitions of willfulness. See, *e.g.*, *United States v. Wise*, 550 F.2d 1180, 1194-1195 (9th Cir. 1977); *United States v. Kaye*, 556 F.2d 855, 863 (7th Cir. 1977), certiorari denied, 434 U.S. 921.

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[7] The four cases were cited in Judge Reynolds' order denying issuance of a preliminary injunction.

[8] This order was entered on April 28, 1975, and defendant was notified of the court's decision on April 30, 1975.

Before defendant committed the acts charged in counts 21-26 of this indictment, Judge Lynch of the Northern District of Illinois had determined that comparable conduct of defendant's company was subject to the criminal provisions contained in Section 104 of the Copyright Act. *E-C Tapes, Inc. v. Kelly*, 412 F.Supp. 245 (N.D. Ill. 1975).

[9] Gov't. Ex. 5 at 50-58; *E-C Tapes, Inc. v. Kelly*, *supra*, 412 F.Supp. at 247; *A. & M. Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977); *Mercury Record Pro. Inc. v. Economic Consult., Inc.*, 64 Wis. 2d 163, 218 N.W. 2d 705 (1974).

IV. *Selective Prosecution*

Defendant argues that his motion to dismiss the indictment on the ground of discriminatory prosecution was improperly denied because he had made a *prima facie* case that he was the victim of such a prosecution and therefore an evidentiary hearing was necessary under *United States v. Falk*, 479 F.2d 616, 618, 620-621 (7th Cir. 1973). A *prima facie* case of discriminatory prosecution consists of proof that the defendant had been singled out for prosecution while others similarly situated had not been prosecuted and that the Government's discriminatory selection was based upon an impermissible ground. In his affidavit submitted with his motion to dismiss defendant alleged that between February 1, 1972, and October 31, 1974, the Federal Bureau of Investigation conducted 6,797 investigations of tape piracy but that thereafter the defendant was the only person criminally prosecuted as a tape pirate. Defendant claimed that this prosecution was initiated in retaliation for his criticism of the change in the law with respect to record piracy.[10] However, defendant did not allege that after the Department of Justice announced in January 1975 its prospective policy to prosecute duplicators of records fixed before February 15, 1972, persons other than the defendant impermissibly had duplicated such records and yet had not been prosecuted. Nor did the defendant prove a causal connection between the exercise of his First Amendment rights and his prosecution for record piracy. The mere fact that this investigation was commenced within weeks of defendant's January 5, 1975, criticism of the Department of Justice's proposed policy change is not sufficient to establish a *prima facie* case for discriminatory prosecution. It is not improper for the Government to concentrate on those violations which appear most flagrant. *United States v. Stout*, 601 F.2d 325, 328 (7th Cir. 1979). As this Court recently stated in that case:

[10] Defendant lobbied in Congress in opposition to the 1976 changes in the scope of Section 1(e) of the Copyright Act and he wrote to the Department of Justice protesting its change in position regarding the scope of the similar use exception.

"Aggressively displaying one's antipathy to the * * * system or daring the government to enforce it does not create immunity from, or a defense to, prosecution." On the facts contained in the record below we cannot conclude that defendant should have been granted an evidentiary hearing as to whether he was a victim of selective prosecution.

For these reasons, the judgment of conviction is affirmed.

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No. 79-1577

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID L. HEILMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 157) is reported at 614 F. 2d 1133.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1980. The petition for a writ of certiorari was filed on April 9, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was convicted under an unconstitutionally vague statute that denied him fair notice that his conduct was unlawful.

2. Whether the evidence was sufficient to prove that petitioner acted willfully.

3. Whether petitioner made a prima facie showing of improper selective prosecution.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 18 counts of willful infringement of the federal copyright laws, in violation of former 17 U.S.C. 1, 101(e), and 104.[1] He was sentenced to concurrent terms of six months' imprisonment and fined $9,000. The court of appeals affirmed (Pet. App. 157).

The evidence presented at trial is summarized in the opinion of the court of appeals (Pet. App. 157 at 2-5). The evidence showed that petitioner duplicated and sold copies of musical recordings that were originally recorded prior to February 15, 1972. He did so without receiving authorization from the holders of the copyrights. Petitioner claimed in the district court that this duplication was permissible under 17 U.S.C. 1(e) because he paid or attempted to pay a two cent royalty to the copyright holders for each record he copied.[2]

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the statutory provisions of the federal Copyright Act are unconstitutionally vague and that he was deprived of fair

[1]The relevant statutory provisions that were in effect at the time of petitioner's actions are set forth at Pet. 25-27. In 1976, the entire body of federal copyright law was rewritten, effective January 1, 1978. See Pub. L. No. 94-553, 90 Stat. 2560, 17 U.S.C. (Supp. I) 101 *et seq.*

[2]Under 17 U.S.C. 1(e), any person may make "similar use" of a mechanically recorded composition upon payment of a two cent royalty to the copyright holder.

notice that his conduct was unlawful. Petitioner's assertions are fully answered in the opinion of the court of appeals (Pet. App. 157), upon which we principally rely.[3]

As the court below explained, the Copyright Act of 1909, while protecting the holders of copyrights, allowed other persons to make "similar use" of a musical composition after an initial recording had been made. 17 U.S.C. 1(e). But as the courts of appeals have uniformly held, copying or exact duplication of sound recordings is not a protected "similar use" within the meaning of the statute. See *Heilman* v. *Bell*, 583 F. 2d 373 (7th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F. 2d 667 (5th Cir.), cert. denied, 423 U.S. 841 (1975); *Jondora Music Publishing Co.* v. *Melody Recordings, Inc.*, 506 F. 2d 392 (3d Cir. 1974), cert. denied, 421 U.S. 1012 (1975); *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F. 2d 285 (10th Cir. 1974) (en banc), cert. denied, 419 U.S. 1120 (1975); *Duchess Music Corp.* v. *Stern*, 458 F. 2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972).[4]

These holdings are predicated on a common-sense interpretation of the statutory language. Naked copying of recordings does not fall within the compulsory license provision, which permits "similar"—not "identical"—use of

[3]The Copyright Act has been amended to remove any possible doubt that unauthorized duplication of recorded musical compositions is forbidden. Under the new statute, duplication of all copyrighted sound recordings is explicitly prohibited regardless of when the original recordings were made. 17 U.S.C. (Supp. I) 114. Any future prosecutions will be instituted under the new statute. Accordingly, petitioner's arguments concerning the scope of the superseded statute do not present issues of continuing importance.

[4]No circuit has reached a contrary conclusion. Nothing has changed since this Court's denial of certiorari in the foregoing cases that would warrant granting review here.

the composer's work. As the court explained in *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc., supra*, 497 F. 2d at 288, "similar use" allows a company to "make its own arrangements, hire its own musicians and artists, and then record. It does not mean that [it] may use the composer's copyrighted work by duplicating and copying the record of a licensed recording company." See also *Heilman* v. *Bell, supra*, 583 F. 2d at 375-378; *Fame Publishing Co., supra*, 507 F. 2d at 669-670; *Jondora Music Publishing Co., supra*, 506 F. 2d at 395; *Duchess Music Corp., supra*, 458 F. 2d at 1310. Moreover, as the district court observed (Pet. App. 149), this interpretation comports with the congressional purpose to foster musical diversity by encouraging a variety of arrangements of a single composition. See also *Shaab* v. *Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

Petitioner's argument that he was denied fair notice that his activities were unlawful is untenable. Petitioner was warned that his actions were illegal by decisions of the Third, Fifth, Ninth, and Tenth Circuits—all rendered before he engaged in the acts charged in the indictment. Petitioner also received explicit notice from the public announcement of the government's intention to prosecute future acts of record piracy.[5] Indeed, petitioner sought a declaratory judgment and an injunction to restrain a criminal prosecution against himself; his motion for a temporary restraining order and a preliminary injunction was denied on April 28, 1975, the day before the occurrence of the first act of copyright infringement alleged in the indictment. See *Heilman* v. *Levi*, 391 F. Supp. 1106 (E.D. Wisc. 1975). Thus, petitioner had ample

[5]Petitioner concedes that he was aware of the policy of the Department of Justice to prosecute future copyright violations (Pet. 16).

notice that continuation of his record duplication business would subject him to criminal prosecution.[6]

2. Petitioner also argues (Pet. 9-15) that the evidence failed to establish that he acted willfully within the meaning of the statute. However, after carefully considering the evidence of intent, both courts below rejected that contention. Further review of this factual issue is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, the evidence amply supports the finding of the lower courts that petitioner acted with knowledge that his behavior was unlawful. As the court of appeals explained (Pet. App. 157 at 8-9):

> In determining [willfullness] * * * it is relevant to examine the critical facts known by the defendant. First of all he knew that the musical compositions which he duplicated were copyrighted. He knew that in January 1975 the Department of Justice had announced a prospective policy to prosecute persons who had made and sold pre-February 15, 1972, duplications. He knew that four Circuit Courts of Appeals had ruled in civil cases that such record duplications constituted copyright infringement. Judge Reynolds had refused to grant him a preliminary injunction because the judge considered

[6]In light of the consistent line of decisions of the courts of appeals, the government's explicit announcement of its prosecution policy, and the district court's denial of petitioner's claim for injunctive relief, petitioner's argument that a judicial interpretation has been applied "retroactively" is plainly without merit. Moreover, in light of the litigation on this very issue in which petitioner and his company were directly involved (*Heilman* v. *Levi*, 391 F. Supp. 1106 (E.D. Wis. 1975); *E-C Tapes, Inc.* v. *Kelly*, 412 F. Supp. 245 (N.D. Ill. 1975)), petitioner is in no position to claim that he lacked "fair warning" that his behavior was in violation of the law. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

> the Copyright Act to forbid defendant's record duplication activities. Finally, defendant knew that his conduct had been ruled illegal under the laws of New York, California, and Wisconsin * * *. Instead of conforming his conduct to the bounds of the law, defendant chose to persist in conduct which he knew had "a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute." That is surely sufficient to meet the accepted definitions of willfulness.[7]

3. Petitioner finally argues (Pet. 15-19) that he was improperly denied an evidentiary hearing on his claim of selective prosecution. However, as the court of appeals correctly concluded, petitioner failed to make a prima facie showing that his prosecution rested on impermissible criteria (Pet. App. 157 at 10-11).

Contrary to petitioner's assertion, the fact that he criticized the Department of Justice's prosecution policy and is the only person to be prosecuted under the former statute for duplicating pre-1972 recordings is not itself prima facie evidence of improper selective prosecution. Petitioner offered no evidence suggesting that he was prosecuted for exercising First Amendment rights. As the court of appeals explained, petitioner was prosecuted as a result of his open and flagrant violation of law—not

[7]The courts below also properly rejected petitioner's assertion that he relied in good faith on the advice of his attorneys. As the district court found (Pet. App. 151-152): "I believe that the defendant went to these two lawyers * * * not for the purpose of obtaining legitimate legal advice as to what his actual prospects were; rather, he went to them as part of an elaborate orchestration of his no willfulness defense."

because he had spoken critically of the government.[8] Indeed, petitioner cites no evidence indicating that other persons continued to duplicate records in violation of the Copyright Act following the government's announcement of its prosecution policy.

In sum, as the court of appeals observed (Pet. App. 157 at 10-11): "It is not improper for the Government to concentrate on those violations which appear most flagrant. * * * 'Aggressively displaying one's antipathy to the * * * system or daring the government to enforce [the law] does not create immunity from, or a defense to, prosecution.' " See also *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (9th Cir. 1975); *United States* v. *Kahl*, 583 F. 2d 1351, 1354 (5th Cir. 1978); *United States* v. *Swanson*, 509 F. 2d 1205, 1208-1209 (8th Cir. 1975); *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974).

[8]The present case is unlike *United States* v. *Falk*, 479 F. 2d 616 (7th Cir. 1973), where the government departed from its written prosecution policy in draft card possession cases by indicting a vocal opponent of the war in Vietnam. In contrast to petitioner, Falk presented a substantial amount of circumstantial evidence suggesting that he had been prosecuted vindictively for exercising his First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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